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A
DIGEST

OF THE

Laws of England

RESPECTING

REAL PROPERTY.

• **By WILLIAM CRUISE,**
OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

VOLUME THE SECOND,

CONTAINING

Title 13. ESTATE UPON CON- DITION.	Title 17. REVERSION.
14. ESTATE BY STATUTE MERCHANT, &c.	18. JOINT-TENANCY.
15. MORTGAGE.	19. COPARCENARY.
16. REMAINDER.	AND
	20. TENANCY IN COM- MON.

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OF THE

SECOND VOLUME.

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A
DIGEST
OF THE
Laws of England
RESPECTING
REAL PROPERTY.

TITLE XIII.
ESTATE ON CONDITION.

CHAP. I.
Of the Nature and different Kinds of Conditions.

CHAP. II.
Of the Performance and Breach of a Condition.

CHAP. I.
Of the Nature and different Kinds of Conditions.

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Section 1.

Nature of Conditions.

1 Inst. 201 a.
 Shep. Tou.
 ch. 6.

A CONDITION is a qualification or restriction annexed to a conveyance of lands, whereby it is provided, that in case a particular event does, or does not happen, or in case the grantor or grantee does, or omits to do, a particular act, an estate shall commence, be enlarged, or defeated. *Conditio dicitur cum quid in casum incertum qui potest tendere ad esse aut non esse confertur.*

Hob. 170.

§ 2. A condition annexed to an estate given, is a divided clause from the grant, and therefore cannot frustrate the grant precedent, neither in any thing expressed, nor in any thing implied, which is of its nature incident to, and inseparable from the thing granted.

Expressed.

Lit. f. 325.

§ 3. Conditions are either in deed, that is, expressed in the deed by which they are created, or else in law, that is, implied by the common or statute law. Thus, where a feoffment or lease is made, reserving rent payable at a certain day, with a proviso that if it is not paid the feoffor may re-enter, this is a condition expressed.

Implied.

§ 4. Conditions implied are those which are created by the common or statute law, without any express words.

words. Thus, to the grant of every estate is annexed by law a condition implied, that the grantee shall not commit felony or treason. Lit. f. 325.

§ 5. Lord Coke says, that there is a condition in law annexed to every estate tail after possibility, by the curtesy, in dower, for life or years, that if the tenants of these estates alien in fee, or claim a greater estate in a court of record, they shall forfeit their estates, and the persons in remainder or reversion may enter. 1 Inst. 233 b.

§ 6. Conditions are also precedent or subsequent. Where a condition must be performed before the estate can commence, it is called *a condition precedent*; but where the effect of a condition is either to enlarge, or defeat an estate already created, it is then called *a condition subsequent*. Precedent or subsequent. 1 Inst. 216 a. 237 a. n. 1.

§ 7. *A.* being tenant for life, with the reversion in fee to *R.*, they agreed to levy a fine, and that it should inure to the use of *A.* and his heirs, if *R.* did not pay 10 s. to *A.* on the 10th of September, and if he did pay, then to the use of *A.* for life, and after to the use of *R.* in fee: this was held to be a condition subsequent; so that *A.* had an estate in fee till *R.* paid the 10 s. because there was a day limited for the payment of the 10 s.; and the subsequent words shewed the intent to be that *A.* should have an estate in fee till the 10 s. paid. Spring v. Caesar, 1 Roll. Ab. 415.

§ 8. A copyholder in borough *English* surrendered to the use of himself for life, and after to the use of his eldest Edwards v. Hammond, 3 Lev. 132.

Title XIII. Estate on Condition, Ch. i. § 8—10.

eldest son and his heirs, if he lived to the age of 21; provided and upon condition that if he died before 21, it should remain to the surrenderor and his heirs. It was resolved, that though, by the first words, it seemed to be a condition precedent, yet, upon all the words taken together, it was not; but a surrender to the use of the eldest son, to be defeated upon a condition subsequent.

§ 9. Where a particular estate is limited with a condition that upon the performance of a certain act, or the happening of a certain event, the person to whom the estate is limited shall thereupon have a larger estate than what was originally limited to him; such a condition is precedent good under certain circumstances, which will be stated in Title 16. Remainder.

1 Term Rep.
645.

§ 10. It was laid down in a modern case by the Court of King's Bench, that there were no precise technical words required in a deed to make a stipulation, a condition precedent, or subsequent; neither did it depend on the circumstance whether the clause was placed prior or posterior in the deed, so that it operated as a proviso or covenant: for the same words had been construed to operate as either the one or the other, according to the nature of the transaction. And in another modern case, the Lord Chief Justice of the Common Pleas (Lord *Eldon*) is reported to have said, "I take it to be fully settled, that a condition is to be construed to be precedent or subsequent as the intent of the testator may require." And Mr. Justice *Heath* added, "It has been truly said, that there are no technical

2 B. & Pul.
R. 295.

“ nical words by which a condition precedent is dis-
 “ tinguishable from a condition subsequent; but that
 “ each case is to receive its own peculiar construction
 “ according to the intent of the devisor. The question
 “ always is, whether the thing is to happen before or
 “ after the estate is to vest; if before, the condition is
 “ precedent, if after, it is subsequent.”

§ 11. A condition in deed may be annexed to every species of estate and interest in real property: to an estate in fee, an estate tail, for life, or for years, in any lands or tenements.

To what
 Estates an-
 nexed.

§ 12. As to things executed, a condition must be created and annexed to the estate at the time of the making of it, and not at any time after.

At what
 Time.
 1 Inst. 236 b.

§ 13. In a celebrated case, which was heard in parliament 2 *Rich. 2.*, it appeared that *Edw. 3.* had made a feoffment in fee to the Duke of *Lancaster* and others, without any condition; and afterwards he required the trustees to perform certain conditions. All the judges and serjeants being summoned, and required to give their opinions on this case, declared, that the feoffees were not obliged to perform the conditions; because they were not expressed at or before the time when the feoffment was made.

Rot. Parl.
 vol. 3. pa. 61.

§ 14. But as to things executory, such as rents, annuities, &c. it is held, that a conveyance of them may be restrained by a condition created after the execution of such conveyance.

1 Inst. 237 a.

A Condition
must defeat
the whole
Estate.

1 Rep. 86 *b.*
6—40 *b.*

§ 15. It is a rule of law, that a condition must defeat or determine the whole of the estate to which it is annexed, and not determine it in part only, and leave it good for the residue.

Jermin v.
Arscott,
1 Rep. 85 *a.*

§ 16. In consequence of this principle, it has been adjudged, that a condition to determine an estate tail, as if the tenant in tail were dead, was void; because the death of a tenant in tail did not determine the estate tail, but his death without issue.

Can only be
reserved to
the Donor.

1 Inst. 214 *a.*

§ 17. A condition, or the benefit of a condition can only be reserved to the donor, feoffor, or lessor, and their heirs, and not to a stranger. For it is a maxim of law, that nothing which lies in action, entry, or re-entry, can be granted over, in order to discourage maintenance and litigation. And where, in the creation of a condition, no words of limitation are mentioned, the law will reserve the benefit of the condition to the heirs of the donor, feoffor, or lessor; for as those are the persons prejudiced by the disposition, it is but reasonable that they should be entitled to the same means of recovering the estate, as their ancestors.

Lit. l. 347.

§ 18. Thus, *Littleton* says, if a man lets land to another for life, by indenture, rendering rent, with a condition of re-entry in default of payment. If, afterwards, the feoffor grants the reversion to a stranger, and the tenant for life attorns, such grantee cannot take advantage of the condition, as the lessor or his heirs might have done, if the reversion had continued in

in him. By the statute 32 Hen. 8. c. 34., grantees of reversions and privies in estate, are enabled to take advantage of the breach of conditions; of which, an account will be given in the next Chapter.

§ 19. Conditions are sometimes void in their creation, as where something is required to be done which is contrary to the divine law, or to the municipal law of the country.

What Conditions are void.

1 Inst. 206 b.

§ 20. All the instances of conditions against law are reducible under one of these heads: 1st, To do something that is *malum in se*, or *malum prohibitum*. 2d, To omit the doing of something that is a duty. 3d, To encourage such crimes and omissions. Such conditions as these the law will always, and, without any regard to circumstances, defeat; being concerned to remove all temptations and inducements to those crimes.

Conditions against Law.

1 P. Wms, 189.

§ 21. A condition repugnant to the nature of the estate to which it is annexed, is void in its creation. Thus, a feoffment in fee, upon condition that the feoffee shall not take the profits, is repugnant and against law, and the estate given is absolute.

Repugnant to the Nature of the Estate.

1 Inst. 206 b.

§ 22. A lease was made to A. B. and C; proviso, that if C. should demand any profits of the lands, or enter into the same during the life of A. or B., (who were his father and mother), that then the estate limited to C. by the same indenture should cease and be utterly void. It was held by the court, that this con-

Moor v. Savill,
2 Leon. 132.

dition and proviso was utterly void, for it was contrary to the estate limited before.

Dyer, 343 b.
Jenk. 243.

§ 23. A condition annexed to the gift of an estate tail, that the donee shall not marry, is void; for, without marriage, he cannot have an heir to his body. But it would be otherwise, if such a condition were annexed to the grant of an estate in fee-simple, for, in that case, a collateral heir may inherit.

Lit. f. 360.
8 Term. R.
61.

§ 24. A condition annexed to an estate in fee-simple, that the tenant shall not alien, is void, being repugnant to the estate given. For a power of alienation is an incident inseparably annexed to an estate in fee-simple.

Lit. f. 361.

But a condition, that a tenant in fee-simple shall not alien to a particular person, is good; for, *Littleton* says, such a condition does not take away all power of alienation.

1 Inst. 223 b.

§ 25. If a feoffment be made in fee, upon condition that the feoffee shall not alien in mortmain, this is a good condition; because such alienation is prohibited by law; and, regularly, whatever is prohibited by law, may be prohibited by condition. And Lord *Coke* observes, that, in ancient deeds of feoffment in fee, there was a clause, "*Quod licitum sit donatori rem
" datam, dare vel vendere cui voluerit, exceptis viris
" religiosis, et judæis.*"

Lit. f. 362.

§ 26. If lands be given in tail, upon condition, that neither the tenant in tail, nor his heirs, shall alien
in

Title XIII. Estate on Condition. Ch. i. § 26—28.

9

in fee or in tail, or for the term of another's life, but only for their own lives, such a condition is good ; for all these alienations are contrary to the statute *De Donis Conditionalibus*.

But, if an estate tail be created with a condition, that the tenant in tail shall not suffer a common recovery, the condition is void; because the right to suffer a common recovery is an incident inseparably annexed to an estate tail.

1 Inst. 223b.

Vide Tit. 36.

§ 27. *John Blunt* devised real estates to his cousin *John Harris* for life, remainder to the issue male of *John Harris*, and to his and their heirs, share and share alike, and, for want of such issue, to the issue female of *John Harris* and her and their heirs, remainder over ; with a proviso, that if *John Harris* or his issue should alienate, mortgage, or incumber, or commit any act or deed whereby to alter, change, charge, or defeat the said bequests, they should pay 2000 *l.* to the person who ought to take next by means of the said limitations. *John Harris* having two daughters, he and they joined in suffering a recovery.

King v.
Burchell,
Amb. R. 379.

Lord Keeper *Henley*, after taking time to consider, delivered his opinion, that *John Harris* took an estate tail, and that the proviso was repugnant to the estate.

§ 28. Lord *Coke* says, that although a condition repugnant to the nature of the estate granted is void, yet that, in all such cases, a bond, by which the obligor is restrained from doing that which the nature of the estate

Whether, in
such Cases,
a Bond is
good.

1 Inst. 206b.

Title XIII. Estate on Condition. Ch. i. § 28—32.

estate granted entitles him to do, will be good. Thus, if a feoffee becomes bound in a bond, not to take the profits of the land, or not to alien, Lord *Coke* says, that such a bond would be good.

§ 29. This doctrine appears questionable, as it offers an obvious mode of restraining a person from those rights over an estate which the common law gives him, and, consequently, frustrates the common law, as fully, as if a condition of this kind were allowed to be inserted in a conveyance of land: and, in some cases, it seems not to have been allowed.

Jervis v. Bruton,
2 Vern. 251.

§ 30. Thus, where *A.* settled lands on *B.* in tail, remainder to his own right heirs, and took a bond from *B.* not to commit waste; the bond being put in suit, it was decreed to be delivered up to be cancelled: and the court said, it was an idle bond.

Jenk. 120.
Freeman v. Freeman,
2 Vern. 233.
Prec. in Cha.
28.

§ 31. There are, however, several cases, in which bonds of this sort have been held good. And one, in which a covenant by a tenant in tail not to suffer a recovery, was considered as binding on the assets of the covenantor.

Tenant for Life or Years restrained from Alienation.

Hob. 170.
1 Inst. 204 a.
223 b.

§ 32. It was formerly held, that if a lease was made to a man and his assigns, he could not be restrained from alienation: but if the word assigns had been omitted, he might then be restrained. It is, however, laid down by Lord *Coke*, that if a man made a lease for life or years, with a condition, that the lessee should not

Title XIII. Estate on Condition. Ch. i. § 32—36.

II

not grant over his estate, or let the lands to any other person, it would be good.

§ 33. A lease was made for years, upon condition that the lessee, his executors or assigns, should not alien without assent of the lessor. The lessee died intestate; and the ordinary granted administration to J. S., who assigned without licence. It was adjudged that the condition was broken, for he was an assignee in law.

More's case,
Cro. Eliz. 26.

§ 34. A condition annexed to an estate for years, that if the lessee, his executors or assigns, did demise the lands for more than from year to year, that then the lease should cease, and be void; was held to be broken by a demise of the lease, by the lessee to his son.

Berry v.
Taunton,
Cro. Eliz.
33¹.
Contra Fox
v. Swann,
infra.

§ 35. Conditions of this kind being in restraint of alienation, are not favoured in law, but are construed strictly in favour of the lessee. It has, therefore, been determined, that a condition of this sort only affects the first lessee, but does not extend to his assignee; so that, if a lessee, who is restrained from alienation by a condition of this kind, assigns over his term with the consent of the lessor, such assignee may assign to any other person, without any farther consent.

Such Con-
ditions con-
strued strictly.

§ 36. The president and scholars of a college at Oxford, made a lease for years to one Bolde, with a proviso, that the lessee, or his assigns, should not alien the premises to any person or persons, without the special

Dumpor's
case,
4 Rep. 119.

cial licence of the lessors. Afterwards, the lessors, by their deed, licensed the lessee to alien or demise the land, or any part of it, to any person or persons whatever. The lessee assigned the term to one *Tabbe*, who devised it to his son, who was also his executor. The son entered generally, and died intestate, and his administrator assigned the term to the defendant. The president and scholars entered for the condition broken.

It was resolved, that the alienation by licence to *Tabbe*, had determined the condition, so that no alienation afterwards made by him, could be a breach of the proviso, or give the lessors a right of entry; for the lessors could not dispense with an alienation for one time, and that the same estate should remain subject to the proviso after.

Whichcot v.
Fox, Cro.
Jac. 398.

§ 37. *George Fox*, lessee for 99 years by indenture rendering rent, covenanted, that he would not alien or assign his term, or any part thereof, to any but his brothers.

The lessee assigned this term to one of his brothers, who assigned it over to a stranger. It was determined, 1st, That this was a condition, not a covenant; and, 2d, That the assignee was not within the condition, but might alien to whom he pleased.

Fox v. Swann,
Sty. 483.

§ 38. Where a lessee for years covenanted with the lessor not to assign over his term, without the lessor's consent in writing, and afterwards, without such consent,

sent, devised the term to J. S.; it was said, that this was not a breach of the covenant, for a devise was not a lease.

§ 39. Where there is a proviso or condition in a lease, that the lessee shall not assign it over, without the permission of the lessor, an underlease has been adjudged not to be within the proviso.

§ 40. In a lease for 21 years, there was a covenant from the lessee, that he would not “ assign, transfer, “ or set over, or otherwise do or put away the said “ indenture of demise, or the premises thereby de- “ mised, or any part thereof, to any person or persons “ whomsoever, without the licence and consent of the “ lessor.”

Cruise v. Bugby,
3 Will. R.
234. 2 Black.
R. 766.

The lessee demised the premises for 14 years without any licence, and the court declared that this underlease was not a breach of the condition, for the courts had always looked nearly into these conditions.

§ 41. But if a lease contains a proviso, that the lessee, his executors or administrators, shall not let, set, or assign over the whole, or part of the premises, without leave in writing of the lessor, on pain of forfeiting the lease, an administrator of the lessee cannot make an underlease.

Roe v. Harrison,
2 Term Rep.
425.

§ 42. A proviso in a lease for years, that the landlord shall re-enter on the tenant's committing an act of bankruptcy

A Lease may
determine by
Bankruptcy.

bankruptcy whereon a commission shall issue, has been held to be good.

Roe v. Gal-
liers, 2 Term
Rep. 133.

§ 43. It was found by special verdict, that, in a lease for 21 years, a proviso was inserted, that if the lessee, his executors, or administrators, should commit any act of bankruptcy, within the intent and meaning of any statutes made or to be made in relation to bankrupts, whereon a commission should issue, and he or they should be found or declared to be a bankrupt or bankrupts, then it should be lawful for the lessor to re-enter.

The lessee became a bankrupt, and the question was, whether the lease was thereby determined.

Mr. Justice *Ashburst* observed, that the general principle was clear, that the landlord having the *jus disponendi*, might annex whatever condition he pleased to his grant, provided it was not illegal, or unreasonable. Then, was this proviso contrary to any express law; or so unreasonable, as that the law would pronounce it to be void? That it was not against any positive law, was admitted; and no case had decided it to be illegal. It remained to be considered, whether it was void or unlawful, as against reason or public policy. It did not appear to be against either. First, it was reasonable that a landlord should exercise his judgment, with respect to the person to whom he trusted the management of his estate: a covenant, therefore, not to assign, was legal: covenants to that effect were frequently

quently inserted in leases, and ejectments every day brought on a breach of such covenants. The landlord might very well provide that the tenant should not make him liable to any risk by a voluntary assignment, or by any act which obliged him to relinquish the possession. If it was reasonable for him to restrain the tenant from assigning, it was equally reasonable for him to guard against such an event as bankruptcy; because the consequence of it was, an assignment of the property into other hands. Perhaps it might be more necessary for the landlord to guard against the latter event, as there was greater danger to be apprehended in that, than in the former case. Persons who were put into possession under a commission, were still less likely to take proper care of the land, than a private assignee of the first tenant. Neither was there any reason of public policy to be urged against allowing such a proviso: it conduced to the security of landlords, which could never be urged as a ground of objection on that head. He was, therefore, of opinion, that it was a valid proviso.

Mr. Justice *Buller* said—This case had been argued on general principles of inconvenience, because the possession of an estate on such terms, enabled the tenants to hold out false colours to the world; but that observation did not apply to the case of land; for a creditor would not rely on the bare possession of the land by the occupier, unless he knew what sort of interest he had in it. If he were desirous of knowing that, he must look into the lease itself, and there he would find the proviso, that the tenant's interest would

be forfeited in case of his bankruptcy. The stock upon the farm might indeed induce a credit, but that would not govern the present case. It was next urged, that this was equivalent to a proviso, that the lease should not be seized under a commission of bankrupt. The defendant's counsel having first supposed the lease to be granted absolutely, for a certain term, and then, that a subsequent proviso was added to that effect. Such a proviso as that, indeed, would be bad, because it would be repugnant to the grant itself; but here, there was an express limitation, that the lease should be void upon the fact of the lessee's becoming a bankrupt. It was clear that the landlord, in this case, parted with the term on account of his personal confidence in the tenant; that was manifestly the case in all leases where clauses against alienation were inserted. The landlord perhaps relied on the tenant's honesty, or he approved of his skill in farming, and thought he would take more care of the farm than another, and, therefore, he had a right to guard against the event of the estate's falling into the hands of any other person, who might not manage it so well as the original tenant. Suppose a lease were made for 21 years, on condition that the tenant should so long continue to occupy the land personally, there could be no objection made to such a condition, for the personal confidence was the very motive of granting the lease, and that was like the present case. If such a proviso as this were inserted in very long leases, it would be tying up property for a considerable length of time, and would be open to the objection of creating a perpetuity. But the principal ground was, that this was a stipulation, not against law,

not regugnant to any thing stated in the former part of the lease, but merely a stipulation against the act of the lessee himself, which it was competent for the lessee to make.

The court resolved that the condition was good.

§ 44. Where a lessee covenanted not to alien or transfer away his lease, and afterwards granted a warrant of attorney to confess judgment on which the lease was taken in execution and sold, it was held not to be a forfeiture of the lease.

A Sale by Execution is not an Alienation.

§ 45. On a trial in ejectment, a verdict was found for the lessor of the plaintiff, subject to the opinion of the court on the following case.

Doe v. Carter,
8 Term. R.
57.

The lessor of the plaintiff demised the premises by lease, in which there was a covenant, that the lessee, his executors, administrators, or assigns, should not let, set, assign, transfer, make over, barter, or exchange, or otherwise part with the lease, or the lands, or any part thereof, to any person or persons whatever, without the special licence and consent of the lessor, his heirs or assigns, with a power of re-entry in case of alienation. A creditor of the lessee for a just debt took from him a warrant of attorney to confess judgment, upon which a judgment was entered, and the lease was sold by execution to a person who had notice of the proviso.

Title XIII. Estate on Condition. Ch. i. § 45—47.

The lessor brought an ejectment against the purchaser of the lease.

Lord *Kenyon* allowed, that there was a distinction between those acts which the party does voluntarily, and those which pass *in invitum*; and said, that judgments in contemplation of law, always pass *in invitum*. His Lordship concluded, that this was not an alienation within the meaning of the covenant; and judgment was given accordingly.

Exception.

§ 46. But where a warrant of attorney is granted for the express purpose of enabling a creditor to take a lease in execution under a judgment, it will be deemed a breach of a condition or covenant against alienation.

**8 Term R.
300.**

§ 47. Thus, in the case of *Doe v. Carter*, the landlord brought a new ejectment, and the jury found the same facts, with this addition, that “ the warrant of
“ attorney was executed for the express purpose of
“ getting possession of the lease;” and the tenant concurred in that intention.

Lord *Kenyon*.—“ When this case first came before
“ the court, the rules that were likely to govern it
“ were so explicitly stated, that I thought we should
“ have heard no more of it. The covenant not to
“ assign, and the proviso to enforce it, were both legal
“ at the time; and, indeed, it was prudent for the
“ landlord to take this care, that an improper tenant
“ should

“ should not be obtruded on him. When the former
 “ question arose, the court, to a certain degree, re-
 “ laxcd the severity of the covenant; and they then
 “ said there was no forfeiture, because all that was
 “ stated was, that a fair creditor had used due diligence
 “ to enforce the payment of a just debt, and that the
 “ lease was taken from the tenant, against his consent,
 “ by judgment of law. But when it is now stated,
 “ that this step was taken for the express purpose of
 “ getting possession of the lease, and that the tenant
 “ consented to it, it would be ridiculous to suppose,
 “ that a court of justice could not see through such a
 “ flimsy pretext as this. Here the maxim applies,
 “ that that which cannot be done *per directum*, shall
 “ not be done *per obliquum*. The tenant could not,
 “ by any assignment under lease or mortgage, have
 “ conveyed his interest to a creditor; and, conse-
 “ quently, he cannot convey it by an attempt of this
 “ kind. If the lease had been taken by the creditor
 “ under an adverse judgment, the tenant not consent-
 “ ing, it would not have been a forfeiture: but here,
 “ the tenant concurred throughout, and the whole
 “ transaction was performed for the very purpose of
 “ enabling the tenant to convey his term to the cre-
 “ ditor.”

It was resolved that the lease was forfeited.

§ 48. The ecclesiastical courts, in conformity to the principles of the *Roman* law, considered all conditions in restraint of marriage as contrary to the public good, and therefore held them to be void. The Court of

Of Conditions
against Mar-
riage.

Chancery first adopted the same doctrine in cases of legacies : but that court always held, that a condition annexed to a devise of land, or of any interest arising out of land, not to marry without consent, was good ; and that, where such a condition was precedent, the estate did not vest till the condition was performed : and where it was subsequent, that the estate would be divested by the breach of the condition.

Fry v. Porter,
1 Cha. Ca.
138.

§ 49. Lord *Newport* devised an estate to his wife for her life, and, after her death, to his grand daughter Lady *Ann Knowles*, and the heirs of her body, provided, and upon condition, that she married with the consent of certain persons ; and in case she married without such consent, then he devised the premises to another person. The grand daughter married without consent ; and it was decreed by the Master of the Rolls that the condition was only *in terrorem*, and the estate was not forfeited. But, upon an appeal, Lord Keeper *Bridgeman*, assisted by *Keeling*, *Vaughan*, and *Hale*, reversed the decree. And *Hale* said, that though, in the civil law, in a case of mere personalty, such a limitation over would be void, yet this being a devise of lands, was not to be governed by that law.

Bertie v.
Faulkland,
3 Cha. Ca.
129.

§ 50. Mr. *Carey* devised his estate to trustees and their heirs, in trust for Mrs. *Willoughby* for her life, in case within three years after his death she married Lord *Guilford* ; but, in case the marriage did not take effect, then he devised the estate to Lord *Faulkland*. Upon the death of the testator, proposals of marriage were made by the lady's friends to Lord *Guilford*, but,
being

being refused, she married Mr. *Bertie*. Lord *Sommers*, assisted by *Holt* and *Treby*, decreed, that the condition precedent not being performed, no relief could be had for the young lady, but that the estate must go over to the next in remainder, this being a condition of marriage, which was a 'thing that could' not be valued.

§ 51. J. S. charged his real estate with 500 *l.*, to be paid to his sister *Alice Herne* within one month after her marriage; but so, nevertheless, as she married with the approbation of his brother, if living; and in case she married without his consent, the 500 *l.* was not to be raised. *Alice Herne* married in the life-time of her brother, but without his consent; and the question was, whether she was entitled to the 500 *l.* or not, for it was said, that this was a condition only *in terrorem*, and that the construction of such a condition always had been, that where there was no devise over, such condition was void, otherwise, where limited over; and here it was not.

Reeves v.
Herne,
5 Vin. Ab.
343.

On the other side, it was argued, that this was a condition precedent, and nothing arose or became due, but upon the marrying with consent; and that being a devise of money out of land, or of a charge upon land, it was to be considered as a devise of land, and to be governed by the same rules; and, then being a plain condition precedent, nothing arose: and for this was cited the cases of *Fry v. Porter*, and *Bertie v. Faulkland*. The Master of the Rolls held, that the charge being upon land, the case was to be decided by the same rule, as if it had

Ante.

been a devise of land; and, being plainly a condition precedent, nothing vested: for it would be too hard to charge the land contrary to the express will of the testator, and to say, the money should be raised, when the testator had said it should not. And decreed accordingly.

§ 52. The validity of conditions in restraint of marriage without consent, was also established in the case of a trust term created for the purpose of raising portions for daughters, by the following determination.

Harvey v.
Aston,
1 Atk. 361.
Com. R. 726.

§ 53. Sir *Thomas Aston* settled his estate to the use of himself for life, remainder to trustees for a term of 1000 years, upon trust in case he should have no son, and should have two daughters, living at the time of his death, that the trustees of the term should raise for such daughters 2000 *l.* a piece, if they married with the consent of their mother; and if either of them died before marriage, with such consent, her portion to cease, and the premises to be discharged; and if raised, then to be paid to the person to whom the premises should belong. The testator, by his will, gave to each of his daughters an additional portion of 2000 *l.*, but subject to the like conditions as in the settlement. The testator died leaving two daughters, who married without the consent of their mother; and afterwards filed a bill in Chancery against the trustees of the term, and their father's executors, to have their portions raised, and paid. It was answered, that the two daughters had married without the consent of their mother, although they and their husbands were informed, previous to their respective marriages, of the clause by which

which they were restrained from marrying without their mother's consent. The Master of the Rolls, (Sir *Joseph Jekyll*), decreed that the plaintiffs were entitled to their original portions, as well as to the additional portions given by the will.

Upon an appeal from this decree to Lord *Hardwicke*, assisted by Lord Chief Justice *Willes*, Lord Chief Justice *Lee*, and Lord Chief Baron *Comyns*, it was determined that the daughters of Sir *Thomas Aston* were not entitled to these portions, in consequence of their marriage without the mother's consent.

Lord Chief Baron *Comyns* observed, that the intention of the testator was perfectly clear, that his daughters should not take the portions, if they married without consent : that the objection which had been most relied on was, that, in the civil law, restrictions of this kind are looked on as unlawful; and that the doctrine of the civil law had been adopted by the Court of Chancery.

In cases of pecuniary legacies, this court had, in some points, adopted the rules established in the ecclesiastical courts, because such legacies might be sued for in the ecclesiastical courts; but, even on this subject, the Court of Chancery had not adopted the rules of the civil law; for where a legacy was given, upon condition of marriage with consent, with a devise over of the legacy, the condition had been held good. That it was a known maxim, that where the estate was to arise upon a condition precedent, it could not vest

until that condition was performed ; and this had been so strongly adhered to, that even where the condition was become impossible, no estate should grow thereon.

Willes's Rep.
83.

Lord Chief Justice *Willes*,—Upon this case, two points have been made : 1st, If it was the intention of the testator that his daughters should have their portions, whether they married with consent or not : 2d, If it was his intention that they should not, then, whether this intent be agreeable to the rules of law and equity.

As to the first, there can be no doubt, either upon the settlement or the will. As to the second part, to begin with the will, the rule is, that *voluntas testatoris totum est*, if not inconsistent with the rules of law and equity ; and they should be very plain indeed, to defeat the intention of the testator.

Ante, f. 50.

The restraint, in the present case, must be taken to be either a condition precedent, or a limitation of the time of payment ; if the first, the case of *Bertie v. Falkland* is in point. If it be taken as a limitation of the time of payment, (and that seems the proper construction), then, even the civil law will not say that they are now entitled, because the time is not yet come.

Lord Chief Justice *Lee* said, there are three sorts of conditions to be rejected : 1st, such as are repugnant ; 2dly, such as are impossible in their creation ; 3dly, such

such as are *mala in se*. But this condition of marrying with consent, does not come under any of those heads ; and in *Fry v. Porter*, it is admitted such a condition is good in respect of land ; though where a compensation can be made, it is true, there is but little difference between conditions precedent and subsequent ; yet, where a condition is annexed to a portion, in order to have a marriage with consent, there is an equitable difference. In the case of a condition subsequent, the thing is vested, and though in the nature of a penalty, yet the intent should be clear and plain, by an express devise over, to divest it. But in the case of a condition precedent, for which there can be no compensation, it would be giving an estate against the intent of the donor, to dispense with the condition. There are no words to vest the portions in the daughters, till a marriage with a consent ; and I very much govern my opinion, in the present case, by the particular penning of this deed ; which has made this a condition precedent, and has vested nothing in the daughters till a marriage with consent. Ante, f. 49.

Upon the whole, therefore, I am of opinion, that a condition to marry with consent is a lawful one, and that it is annexed to these portions : that it is a condition precedent, and that nothing can vest in the plaintiffs till that condition is performed.

Lord *Hardwicke*,—I agree with my lords the judges in opinion, and do hold, that nothing is more fixed, since the case of *Pawlet v. Pawlet*, than that portions charged on lands will not vest till the time of payment comes, which,

which, in this case, is not till a marriage with consent; and, therefore, there is no rule in law or equity that can excuse the want of such consent: that there is no such rule where they are given over, has been clearly proved; and the ordering that the estate shall be exonerated, I think is equal to a devise over. But admitting that there is no devise over, then the question will be, whether this condition is *in terrorem* only? And I own I do not know that the rule obtains so generally as has been laid down: I have understood it only of legacies, and not of portions.

Reynish v.
Marton,
3 Atk. 330.

These portions arise out of land, and have nothing testamentary in them; so are not subject to the jurisdiction of the ecclesiastical court, nor to be governed by the rules of the civil law, but are subject only to the rules of the common law. If Sir *Thomas Aston* had expressly limited the term to his daughters, on their marrying with consent, the term could never arise until they were so married: and why has he not the same power over the trust of the term as over the term itself?

The decree made at the Rolls was reversed.

Manfell v.
Manfell,
cited 2 Bro.
Rep. 473.

§ 54. Sir *E. Manfell*, being seised in fee, devised to his son *Edward Manfell* for life, adding these words:
“ And I will that he shall be capable, with the consent
“ of the said trustees, to settle a jointure on the woman
“ they agree to in writing he should marry.”

The

The testator died, leaving his son *Edward Mansell* married; but his wife dying, and the trustees being also both dead, he married again, and settled the whole estate on his wife by way of jointure. It was contended, that the want of consent of the heir of the surviving trustee to the marriage and jointure, invalidated the execution of the power.

Lord Commissioner *Willes* said, that this was a condition precedent, and not being performed, no estate could arise.

Lord Commissioner *Wilmot* said, “ Such an act as
“ attends this power must be in the nature of a con-
“ dition precedent. I have no idea of a condition an-
“ nexed to a power being subsequent; the condition
“ must be performed before the power can take
“ effect.”

Vide Sir E.
Wilmot's
Notes, 1.

§ 55. Conditions in restraint of marriage are, however, so far discouraged by the *English* law, that they are construed strictly in favour of the person on whom such restraints are laid.

They are
construed
strictly.

§ 56. *J. S.* having four daughters, *A.*, *B.*, *C.*, and *D.*, devised several parcels of his estate to his four daughters, and, among other devises, he gave to his trustees his lands in *E.* and *F.* in trust for his daughter *A.* until her marriage or death; and in case she married with the consent of the trustees, then to her and her heirs; but in case she should marry without their consent, then to her other sisters equally between them.

Clerk v.
Lucy, 5 Vin.
Ab. 88.
2 Ab. Eq.
213.

Three years after, *A.* married with the consent and approbation of her father, who settled upon this marriage part of the lands which he had devised to her, and some other property. A year after, *J. S.* died, without having altered his will. It was objected that this was a condition precedent, and, until performance, the estate could not vest; and that equity would not aid in this case. But it was decreed by Lord Chancellor *Cowper*, that by the marriage with the consent of the father, the condition was dispensed with, and the devise became absolute; for conditions of this kind, whether precedent or subsequent, were in the nature of penalties and forfeitures; and if the substantial part and intent was performed, equity would supply small defects and circumstances, and favour the devisee. Here was no forfeiture; and it was never the intent of the testator that the estate should be taken from the first devisee, when it could go to the devisee over, and be let to descend to the heir at law.

Robinson v.
Comyns,
Forrest. 164.

Vide Daly v.
Desbouverie,
2 Atk. 261.

§ 57. A person devised all his lands to one *Comyns* and his heirs, to the use of him and his heirs, in trust for payment of debts; and afterwards in trust for his grand-daughter *Mary* and the heirs of her body, remainder to *Comyns* and his heirs, upon condition that he should marry the testator's grand-daughter *Mary*. *Comyns* offered to marry the lady, but she refused, and soon after married another person. Lord *Talbot* was of opinion that this was a condition subsequent, and that it was dispensed with by the refusal of the lady.

§ 58. A person

§ 58. A person devised his estate to trustees, to the use of his son *Robert* for life, remainder to the wife of such son for life, remainder to the first and other sons of his said son in tail ; with a proviso, that if the son should marry any woman not having a competent marriage portion, *or* without the consent and approbation of the said trustees, their heirs and assigns, in writing under their hands and seals, first had and obtained, then his trustees, immediately after the decease of his son, should stand seised of the premises, to the use of the testator's two daughters. And he declared that the said proviso or condition was not intended by him, or to be construed or taken to be *in terrorem* ; but a condition in want of performance whereof, in every respect, the estate should in no case be vested in his son, nor the heirs of that marriage.

Long v.
Dennis,
4 Burr. R.
2052.

The son married a woman who had a competent portion, but without the consent or approbation of the trustees : and, upon the death of the son, the daughters claimed the estate, under the condition in the will.

Lord *Mansfield*,—" Conditions in restraint of marriage are odious ; and are therefore held to the utmost rigour and strictness. They are contrary to sound policy. By the *Roman* law, they are all void. Conditions precedent must previously exist. Therefore, in these, there can be no liberality, except in the construction of the clauses. But, in cases of conditions subsequent, it has been established by precedents, that where the estate is not given over,
" they

“ they shall be considered as only *in terrorem*. This
 “ shews how odious such conditions are : for, in rea-
 “ son and argument, the distinction between being and
 “ not being limited over, is very nice ; and a clause
 “ can carry very little terror which is adjudged to be
 “ of no effect. If the estate is given over, such a con-
 “ dition cannot be got over. The present case is
 “ doubly *in terrorem*, and made so by adding the
 “ clause, that the said proviso or condition was not in-
 “ tended by him, nor to be construed or taken to be *in*
 “ *terrorem*.”

“ In the case of *Daley v. Clanrickarde*, in Chancery,
 “ 10th *December* 1738, the condition was, that he
 “ should marry with the consent of trustees, if not,
 “ the estate was given over. The trustees were ap-
 “ plied to ; they offered to agree, on a proper settle-
 “ ment being made. The marriage was had without
 “ their knowledge, but the settlement being after-
 “ wards made, their conditional consent was holden
 “ to be sufficient. In the case of *Bolton et ux. v.*
 “ *Humphries et al.*, 20th *February* 1755, in Canc.
 “ the condition was, that if she married with the con-
 “ sent of *N. H.* in writing, then, &c. and the estate
 “ was given over. She married without his privity,
 “ but he gave his consent as soon as he knew of the
 “ marriage. Lord *Hardwicke* held this a sufficient
 “ consent to entitle her to the real and personal estate
 “ which was given her, if she married with the con-
 “ sent and approbation of *N. H.*, to be signified in
 “ writing.

“ I mention

“ I mention these cases to show, that the court
“ ought not to make strides in favour of a forfeiture.

“ There can be but one true legal construction of
“ these conditions, and, therefore, it must be the same
“ in the Court of Chancery, and all the other courts
“ in *Westminster Hall*.

“ The meaning of the testator, or the controul
“ which the law puts upon his meaning, cannot vary,
“ in what court soever the question chances to be de-
“ termined. In the present case, the forfeiture is so
“ cruel, as to begin with the innocent issue of the
“ offender, who is to have it for his own life at all
“ events.

“ This testator considered money as the only quali-
“ fication of a wife : but he still means to leave it to the
“ judgment of the trustees, whether there might not be
“ some equivalent for money : he only meant to re-
“ quire their sanction, in case his son married a wo-
“ man without a competent fortune. This is un-
“ doubtedly a condition precedent ; it must have been
“ performed before the son could take, before his in-
“ terest could vest. The construction must be, to
“ vest the estate, in case his son married a woman with
“ a competent fortune, or had the consent and appro-
“ bation of his trustees, to marry a woman without
“ one. The blunder is in the penning only. The
“ meaning is, that, in either event, it shall vest. The
“ performance of *either part* of the alternative vests
“ the estate.

“ Here

Title XIII. Estate on Condition. Ch. i. § 58, 59.

“ Here is no objection to the marriage, and, one
 “ of the trustees is become one of the devisees over ;
 “ therefore a cause of objection ought to be shewn,
 “ otherwise it shall be considered as if his consent was
 “ withholden without reason. The consequence is,
 “ that judgment must be given for the defendant.”

The three other judges concurred in thinking it to have been the intention of the testator, that his son's complying with either part of the alternative, should be a performance of the condition ; and that he did not incur a forfeiture, unless he had broken both parts of it. And they all agreed, that all conditions in restraint of marriage ought to be construed with the utmost rigour and strictness.

O'Callaghan,
 v. Cooper,
 5 Ves. jun.
 117.

Scott v.
 Tyler, Harg.
 Jur. Arg.
 v. 1. 22.
 Dickens, 712.

§ 59. In a modern case, it was held, that the same principles of policy which annul conditions that tend to a general restraint of marriage, will favour and support them, when they merely prescribe such provident regulations and sanctions, as tend to protect the individual from those consequences to which an over-hasty, rash, or precipitate match, would probably lead : therefore, if the conditions are only such, whereby a marriage is not altogether prohibited, but only in part restrained, as in respect of time, place, or person, then such conditions are good. An injunction to ask consent is lawful, as not restraining marriage generally. A condition prescribing due ceremonies, and place of marriage, is good, which only limits the time to 21, or any other reasonable age, provided it be not used evasively to restrain marriage generally.

Stackpool v.
 Beaumont,
 3 Ves. jun.
 89.

§ 60. A con-

§ 60. A condition by which a widow is restrained from marriage generally, is good, and is construed in favour of the person to whom the estate is given, on breach of the condition.

A Widow
may be re-
strained from
Marriage.

§ 61. *R. H.* being seised in fee, devised certain lands to his wife and her heirs; but if she married again, then he devised those lands to his daughter in fee. The wife married again, and it was adjudged that the estate should go over to the daughter.

Fitchett v.
Adams,
2 Stra. 1128.

TITLE XIII.

ESTATE ON CONDITION.

CHAP. II.

Of the Performance and Breach of a Condition.

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| <p>§ 1. <i>How to be performed.</i>
 6. <i>Who may perform a Condition.</i>
 11. <i>At what Time.</i>
 13. <i>At what Place.</i>
 16. <i>Who are bound to perform a Condition.</i>
 20. <i>Effect of the Performance of a Condition.</i>
 22. <i>What excuses the Non-performance of a Condition.</i>
 32. <i>Where Equity interposes.</i>
 38. <i>Where Equity will not relieve.</i>
 42. <i>Of Entry for a Condition broken.</i></p> | <p>50. <i>None but Parties and Privies can enter.</i>
 52. <i>Exception.</i>
 53. <i>None but the Heir at Common Law can enter.</i>
 55. <i>Of the Statute 32 Hen. 8. c. 34.</i>
 57. <i>A Condition cannot be apportioned.</i>
 58. <i>Exception.</i>
 59. <i>Effect of an Entry for a Condition broken.</i>
 63. <i>Does not defeat Copyhold Grants.</i>
 65. <i>Distinction between a Condition and a Limitation.</i></p> |
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Section 1.

How to be performed.

1 Inst. 219 b.

WITH respect to the performance of conditions, Lord Coke says, a diversity is to be understood between conditions that are to create an estate, and conditions that are to destroy an estate. For a condition that is to create an estate, is to be performed by construction of law, as near the condition as may be, and according to the intent and meaning of the condition; albeit the letter and words of the condition cannot be performed. But otherwise, it is of a condition that destroys an estate, for that is to be taken strictly, unless it be in certain special cases.

§ 2. Where

§ 2. Where a literal performance of the condition becomes impossible, by the happening of some subsequent event, the condition must then be performed as near the intent as possible.

§ 3. Thus, *Littleton* says, if a feoffment be made upon condition that the feoffee shall give the land to the feoffor and his wife, to hold to them and to the heirs of their two bodies engendered; and for default of such issue, the remainder to the right heirs of the feoffor. In this case, if the husband dies, living the wife, before any estate tail made unto them, then ought the feoffee to make an estate to the wife as near to the intent of the condition as may be; that is, to limit the land to the wife for life, without impeachment of waste, remainder to the heirs of the body of her husband on her begotten, remainder to the right heirs of the husband. f. 352.

§ 4. Where there is a condition precedent copulative, the whole must be performed before the estate can arise.

§ 5. Sir *Henry Wood*, reciting the intended marriage of his daughter with the Duke of *Southampton*, limited his estate to the use of himself for life, remainder to the use of trustees and their heirs, to the intent that in case the Duke of *Southampton* should be married to his daughter, after the age of sixteen, and that they should have issue male, that then the trustees and their heirs should stand seised of the premises in trust for the Duke

Wood v. Duke of Southampton, Show. Parl. Ca. 83. 2 Freem. R. 186.

during his life. The marriage took place before the lady was sixteen, but she lived to that age, and then died without issue.

Com. Rep.
732.

The question was, whether the Duke was entitled to an estate for life. It was decreed, that the Duke was entitled to an estate for life under the settlement: but this decree was reversed in the House of Lords; and Lord Chief Baron *Comyns* says the reversal was founded on this, that the words were plain and certain that there must not only be a marriage, but also issue male. And when a condition copulative, consisting of several branches, is made precedent to any use or trust, the entire condition must be performed, else the use or trust can never arise or take place; and it would be violence to break the condition into two parts, which is but one according to the plain and natural sense of it.

Who may
perform a
Condition.
Lit. f. 336.

§ 6. With respect to the person who may perform a condition, it is a general rule that every person who has an interest in the condition, or in the land to which it relates, 'may perform it; as if a feoffee, upon condition to pay at *Michaelmas* 20 l., enfeoffs another person before *Michaelmas*, the second feoffee may perform the condition.

Lit. f. 334.
337.

§ 7. Where a time is appointed for the performance of a condition, the right of performing it will descend to the heir. Thus, if a feoffment be made in mortgage, upon condition that the feoffor shall pay a certain

sum at such a day, &c.; although the feoffor should die before the day of payment, yet his heir may perform the condition.

§ 8. A person, having two sons, *B.* and *C.* devised lands to his wife for life, and after her death, to his son *C.* and his heirs; provided that if *B.* did, within three months after the death of his wife, pay to *C.*, his executors or administrators the sum of 500*l.*, then the said lands should go to *B.* and his heirs. The wife lived several years, and during her life *B.* died, leaving *J. D.* his heir, who not being heir at law of the testator, the question was, whether he could now, after the death of the wife, perform the condition. And though it was objected that this being a condition precedent, and merely personal in *B.* who had neither *jus in re* nor *ad rem*, and could not therefore release or extinguish the condition, and consequently that his heir could not perform it after his death; yet it was held, and so decreed, that the possibility of performing this condition was an interest or right, or *scintilla juris*, which vested in *B.* himself; and, consequently, such right descended on his heir, and might be performed by him.

Marks v. Marks, 1 Ab. Eq. 106.

§ 9. But where the words of a condition are general, and no time is specified for the performance of it, such condition must be performed by the parties to whom the condition is reserved, and not by their heirs.

§ 10. Thus, *Littleton* says, where a feoffment is made upon condition that if the feoffor pay a certain

l. 337.

sum of money to the feoffee, then it shall be lawful for the feoffor and his heirs to enter. In this case, if the feoffor dies before the payment is made, his heir cannot perform the condition.

At what
Time,

§ 11. Where a particular time is appointed for the performance of a condition, it must be performed at, or before the time; but where no particular time is appointed, the person to whom the condition is reserved must, in some cases, perform it within a reasonable and convenient time; and, in other cases, he may perform it at any time during his life; but if he dies without performing it, the right is not transmitted to his heir.

Lit. f. 337.

3 And. 73.

§ 12. Thus, if a feoffment be made upon condition, that if the feoffee does not pay, &c. it shall be lawful for the feoffor, to re-enter. The money ought to be paid to the feoffor in convenient time, for it is not reasonable that the feoffee shall have the benefit of the land, and not pay the money. But if the condition be, that if the feoffor pays, &c. he may re-enter; the feoffor has time to pay it during his life, because the other has the profit of the land, and has no loss by nonpayment.

At what
Place.

Bro. Ab.
Tit. Cond.
pl. 31.
1 Roll. Ab.
444.

§ 13. If a particular place is appointed for the performance of a condition, the party who is to perform it must come to that place, for the person to whom the condition is to be performed, is not obliged to accept of the performance elsewhere; but he may, if he pleases, accept of the performance at another place, and such acceptance will be good.

§ 14. If

§ 14. If no particular place be appointed for the performance of a condition, and the condition be, that the feoffee shall pay a sum of money, in that case, the feoffee must seek for the person to whom the money is to be paid, if he be within the realm. But if he is out of the realm, then it is not incumbent on the feoffee to seek him, nor is the condition broken.

Lit. f. 340.
1 Inst. 210 b.

§ 15. But where the condition is, to deliver 20 quarters of wheat, or 20 load of timber, or such like, the feoffor is not bound to carry the same about, and seek the feoffee; but the feoffor must, before the day, go to the feoffee, and know where he will appoint to receive it, and there it must be delivered.

1 Inst. 210 b.
2 Leon. 260.

§ 16. Where an estate is given upon condition, the taking possession of the land to which the condition is annexed, binds to the performance of the condition, even though such performance should be attended with loss.

Who are
bound to
perform a
Condition.

§ 17. *Ralph Duke of Montague*, devised all his real estates to his son *John*, afterwards Duke of *Montague*, for life, on condition that he should, in twelve months after the testator's death, or within twelve months after he attained the age of 21 years, suffer a recovery of an estate in the county of *Warwick*, and settle it to certain uses. But if he should neglect or refuse so to do, then the testator declared that the devise of his real estate to his said son should cease and be void; and, in that case, should go according to uses therein limited, in the

Duke of
Montague v.
Beaulieu,
3 Bro. Parl.
Ca. 277.

same manner as if his said son was really dead. *John Duke of Montague* suffered a recovery of the estate in *Warwickshire*, but declared different uses of it from those mentioned in his father's will, and, nevertheless, continued in possession of the devised estate.

It was decreed by Lord *Northington*, that as *John Duke of Montague* had accepted and taken several estates under his father's will, he became bound, in consequence thereof, to perform the condition imposed on him by that will. And this decree was affirmed by the House of Lords.

Attor. Gen. v.
Christ's Hos-
pital, 3 Bro.
Rep. 165.

§ 18. An estate being devised to *Christ's Hospital*, on condition of maintaining six children from the parish of *St. Leonard Shoreditch*; and the hospital having taken possession, the rents at first proved insufficient to maintain the number, and the hospital had maintained only three; and an account having been exhibited to the governors, the latter had been satisfied. But upon filing the information, it was found, that there had been a mistake in the account, and the rents had not been expended; and it appeared the rents were now sufficient to maintain the whole number.

Attor. Gen. v.
Andrew,
3 Ves. jun.
633.

The Lord Chancellor thought that, whether the rents were or were not sufficient to maintain the number, the hospital having taken possession of the estate, was bound to perform the condition; and that they should have considered of that, previous to taking possession.

§ 19. If

§ 19. If an estate be made to a married woman upon condition, she will be bound to perform it; because this does not charge her person, but the land. So, if an estate be made to an infant upon an express condition, the infant shall be bound to perform it. And if an estate be made to a person in fee, upon condition, his heir, after his death, though he be within age, shall be bound by the condition.

1 Roll. Ab.
421.

§ 20. When a condition is performed, it is thenceforth entirely gone; and the thing to which it was before annexed, becomes absolute and wholly unconditional.

Effect of the
Performance
of a Con-
dition.

§ 21. We have seen, that this was the principle which was adopted by the judges in the construction of gifts to a man and the heirs of his body. But the statute *De Donis Conditionalibus* took away this construction, and declared, that this kind of estate should descend to the heirs of the body only of the grantee, and that there remained a reversion in the grantor, and not a right of entry for a condition broken.

Tit. 2. l. 5.

§ 22. There are several circumstances which will excuse the non-performance of a condition. Thus, where the performance of a condition becomes impossible by the act of God, it is excused.

What excuses
the Non-per-
formance of
a Condition.

§ 23. One devised to his eldest daughter, upon condition she should marry his nephew on or before she attained the age of 21 years. The nephew died young,
and

Thomas v.
Howell,
1 Salk. 170.

and the daughter never refused, nor was ever required to marry him.

1 Inst. 206 a.
2 Atk. 18.

It was adjudged that the condition was not broken, having become impossible by the act of God.

1 Inst. 206 a.
218 a.

§ 24. In all cases of this kind, if the condition is precedent, no estate vests : but if it be subsequent, the estate becomes absolute.

Wigley v.
Blackwal,
Cro. Eliz.
780.

§ 25. If a condition consists of two parts, of which one was impossible to be performed at the time when the condition was created, yet the other must be performed ; and the performance of the part which is possible, will be sufficient.

Laughter's
case,
5 Rep. 21 b.

§ 26. But where a condition consists of two parts in the disjunctive, and the party has an election, which of them to perform, and both are possible at the time of creating the condition, but one of them becomes after impossible by the act of God, this shall excuse the performance of that, and also of the other ; for otherwise the election would be taken away by the act of God.

1 Ld. Raym.
279.

§ 27. In a subsequent case, it was said, “ That the rule and reason in *Laughter's* case ought not to be taken so largely as *Coke* has reported, but according to the nature of the case.”

1 Roll. Ab.
453.

§ 28. A condition may also be excused by the default of the person to whom it is to be performed,

viz.

viz. by tender and refusal. It is also excused, 1st, By his absence, in those cases where his presence is necessary for the performance of the condition: 2d, By his obstructing or preventing the performance; and, 3d, By his neglecting to do the first act, if it be incumbent on him to perform it.

1 Inst. 206 *b.*
209 *a.*

§ 29. Thus, if a man be bound to build a house, &c. he will be excused, if the person to whom he is bound prevents him from building it, either by any act of his own, or by any act of a stranger by his command.

Bro. Ab.
Tit. Coven.
pl. 31.

§ 30. The condition of a bond was, that *A.* and his wife should, in *Easter Term*, levy a fine to *B.* *Hobart* said that, in this case, *B.* was bound to sue out a writ of covenant, otherwise the condition was not broken.

Walrond v.
Hill,
Hut. 48.

§ 31. In an action of debt for 500 *l.* the penalty for articles of agreement, the declaration stated the agreement to have been, that *Shore* (the defendant) was to purchase of the Duke (the plaintiff) a farm at the price of 2594 *l.*, which was to be paid at *Lady Day* then next, in the following manner. The Duke was to accept of a conveyance of certain estates of *Shore* at the price of 1820 *l.*, which he was to convey at the expence of the Duke, and the Duke to make a good title to *Shore* at his (*Shore's*) expence, who, on executing the conveyances, was to receive the rest of the purchase money. All timber trees, elms, and willows, which then were upon any of the estates, to be valued,
and

Duke of St.
Albans v.
Shore.
1 H. Black.
R. 270.

and the prices thereof to be paid by the respective purchasers. It was also agreed, that in case the plaintiff should not be enabled to make a good title to the estate before the 24th of *March*, the agreement should be void. And although the plaintiff had done every thing on his part, &c. yet protesting that the defendant had not done any thing on his part, &c. the defendant pleaded, that the Duke was not capable, ready, and willing, to make a good title to the said farm; and, further, that the said Duke had cut down divers trees on the said farm, which, by the agreement, were to be valued, whereby the said Duke disabled himself from performing; for which reason, the defendant declined and refused to carry the articles into execution. Replication; issue on the first plea, and general demurrer to the second.

Lord *Loughborough*, in delivering the judgment of the court, said it was clear, that unless the plaintiff had done all that was incumbent on him to do, in order to create a performance by the defendant, (if he might use the expression), he was not entitled to maintain the action. If he had not set forth a sufficient title, judgment must be against him, whatever the plea was; and if the plea was a good bar, the same consequence would follow. It was argued on the part of the plaintiff, that the agreement respecting the trees was not a condition precedent, and, therefore, a breach of that agreement could not be pleaded in bar of the action. In support of this argument, the case of *Boone v. Eyre* was cited, but, in that case, though the Court of King's Bench held the plea insufficient, yet they laid down

1 H. Black.
R. 273. note.

down a clear and well founded distinction, that where a covenant went to the whole of the consideration on both sides, there it was a condition precedent; but where it did not go to the whole, but only to a part, there it was not a condition precedent, and each party must resort to his separate remedy: and, for this plain reason, because the damages might be unequal. Then the question was, whether the covenant of the plaintiff went to the whole consideration of that which was to be done by the defendant? The Duke clearly covenanted to convey an estate to the defendant, in which all the timber growing on the estate was necessarily included. The timber was not disjoined from the estate by a separate valuation. It was expressly agreed, that all trees, &c. which then were upon any of the estates, should be valued. But it was not to be permitted to a party contracting to convey land, which included the timber, by his own act, to alter the nature of it, between the time of entering into the contract and that of performing it. There might be cases where the timber growing on an estate was the chief inducement to a purchase of that estate. But it was not necessary to inquire whether it was the chief inducement to a purchase or not; for if it might be in any sort a consideration to the party purchasing, to have the timber; the party selling ought not to be permitted to alter the estate by cutting down any of it. This was not an action of covenant where one party had performed his part, but was brought for a penalty, on the other party refusing to execute a contract. But, to entitle the party bringing the action to a penalty, he ought punctually, exactly, and literally, to complete his part.

The

Heard v.
Wadham,
2 East. R.
619.

The court was, therefore, of opinion, that the plea was a good bar to the action, and, on this, gave their judgment for the defendant.

Where Equity
interposes.

§ 32. The Court of Chancery has, in many cases, interposed, to moderate the rigour of the common law, in respect to the breach of conditions, upon the principle, that equity ought to relieve against all forfeitures and penalties, wherever a compensation can be made.

Hayward v.
Angel,
1 Vern. 222.

§ 33. It was formerly held, that a court of equity could not relieve against a condition which was precedent, but that, in cases of conditions subsequent, it was otherwise. But it is now settled, that the substantial distinction which governs the interference of courts of equity in cases of conditions, is not, whether the condition be precedent or subsequent, but whether compensation can, or cannot, be made.

Cage v.
Ruffell,
2 Vent. 352.

§ 34. A feme covert having a power to devise lands, devised them to her executors to pay 500 l. out of them to her son, provided, that if the father gave not a sufficient release of certain goods to her executors, that then the devise of the 500 l. should be void, and go to the executors. After her death, a release was tendered to the father, which he refused to execute. On a bill brought by the son against the executors and the father, the father answered, that he was now ready to release, though for some reasons he had before refused: whereupon, the Lord Chancellor decreed the payment of the 500 l., and said, it was the

standing rule of the court, that a forfeiture should not bind where a thing may be done after, or a compensation made for it.

§ 35. Where a man devised lands to J. B. upon condition to pay 20,000*l.* to his heir at law, viz. 1000*l.* *per annum* for the first 16 years, and 2000*l.* *per annum* after, till the whole should be paid, the heir entered for the nonpayment of one of the sums of 1000*l.* It was decreed, that J. B. should be relieved upon payment of the 1000*l.* with interest; the court declaring, that wherever it could give satisfaction or compensation for the breach of a condition, it would relieve.

Grimstone v.
Lord Bruce,
1 Salk. 156.

§ 36. A person, having three daughters, devised lands to his eldest daughter upon condition that she should, within six months after his death, pay certain sums to her two sisters; and if she failed, then he devised the lands to his second daughter on the like condition. The court said it would enlarge the time of payment, though the lands were devised over; and that in all cases that lie in compensation, the court may dispense with the time, even in the case of a condition precedent.

Woodman v.
Blake,
2 Vern. 222.

§ 37. A person devised lands to his kinsman J. S., paying 1000*l.* a piece to his two daughters, who were his heirs at law. J. S. made default, and the daughters recovered in ejectment. It was decreed, that the heir of J. S. should be relieved on payment of the principal

Barnadiston
v. Fane,
2 Vern. 366.

principal and interest, though in favour of a volunteer and to the disherison of the heir.

Where Equity
will not re-
lieve.

§ 38. Where there can be no compensation in damages, a court of equity will not relieve.

Waser v.
Mocato,
9 Mod. 112.

§ 39. Where a man made a lease upon a condition of re-entry for a forfeiture, or that the lease should be void if the lessee aliened or assigned it without licence, and afterwards the lessee did assign it without licence, the court said this was a forfeiture, against which it could not relieve, because it was unknown what should be the measure of the damages; for the court never relieves but in those cases where it can give some compensation in damages, and where there is some rule to be the measure of such damages to avoid being arbitrary.

§ 40. Where there is no ground for the interference of a court of equity, to relieve against a condition, and an estate is limited, defeasible upon the breach of a condition, a re-conveyance will be decreed.

Hunt v.
Hunt,
Gilb. R. 43.
Prec. in Cha.
387.

§ 41. A proviso was inserted in a marriage settlement, that if the intended marriage took effect, and the intended wife should not, when she came of age, by fine or otherwise, join in charging an estate to which she was then entitled with 2000 l., then the settlement was to be void. The marriage took effect; but the wife finding, when she came of age, that her own estate was of greater value than the jointure, she and her husband

band refused to join in charging it with 2000 *l.*; wherefore a bill was brought to have a re conveyance, which was decreed, and an account of the rents and profits directed from the time of the refusal, but no costs on either side; for this was not a condition precedent, but subsequent to the vesting of the estates in the defendant.

§ 42. Upon breach of a condition, the feoffor, grantor, or his heirs becomes entitled to the estate to which such condition was annexed. And in the case of freehold estates in lands, the only mode by which advantage can be taken of the breach of a condition is by entry; or if that should be impossible, then by claim; because the solemnity of a feoffment with livery of seisin can only be defeated by an act of equal notoriety.

Of Entry for a Condition broken.

1 Inst. 218 *a.*

§ 43. An entry by a stranger, on behalf of the person entitled to enter, is good, without any authority; provided it be assented to afterwards by the person entitled.

Fitchet v. Adams,
2 Stra. 1128.

§ 44. In the case of advowsons, rents, commons, remainders, and reversions, where no entry can be made, there must be a claim, which must be made at the church or upon the land.

1 Inst. 218 *a.*

§ 45. Where an estate for years determines by a condition, no entry is necessary. Thus, if a person demises lands for years, upon condition that if the lessor pays the lessee 10 *l.*, his estate shall cease, there, if the

Bro. Ab.
Tit Cond.
pl 83.

lessor performs the condition, the estate of the lessee is immediately determined without any entry.

f. 350.

§ 46. *Littleton* has stated the following case in which no entry is necessary :—Where land is granted to a man for term of five years, with a condition that if he pays the grantor, within the two first years, 40 marks, that then he shall have the fee, or otherwise but for five years ; and livery of seisin is made by force of the grant. Now the grantee has a fee-simple conditional, and if he does not pay the 40 marks within the time, then the fee and the freehold shall be adjudged to be in the grantor without entry or claim ; because the grantor cannot immediately enter, for the grantee is still entitled to hold the lands for three years. “ For
 1 Inst. 218 a. “ seeing, by construction of law, the freehold and inheritance passeth *maintenant* out of the lessor ; by the
 “ like construction, the freehold and inheritance, by
 “ default of the lessee, shall be revested in the lessor,
 “ without entry or claim.”

Id.

§ 47. Lord *Coke* mentions two other exceptions to this rule : 1st, If a person grants a rent-charge out of his lands upon condition, there, if the condition is broken, the rent will be extinct ; because the grantor, being in possession, need not make a claim upon his own land ; and therefore the law will adjudge the rent void, without any claim.

Id.

§ 48. If a man makes a feoffment in fee, upon condition that the feoffee shall pay 20 l. on a particular day, and before the day the feoffee lets the land to
 the

the feoffor for years, reserving rent, and afterwards fails of payment, the feoffor shall retain the land; for he could not enter, being himself in possession.

§ 49. There is, however, a distinction between a condition that requires an entry, and a limitation that determines the estate *ipso facto* without an entry; f. 65. of which, an account will be given hereafter.

§ 50. We have seen, that the benefit of a condition can only be reserved to the feoffor, donor, or lessor, and their heirs; and it is a rule of the common law, that no one can take advantage of the breach of a condition expressed, but parties and privies in right and representation, as heirs, executors, or administrators of natural persons, and the successors of bodies politic. So that neither privies nor assignees in law, as lords by escheat, nor privies in estate, as persons in remainder, can enter for a condition broken.

None but Parties and Privies can enter.

Lit. f. 347.
1 Inst. 214
a & b.

§ 51. Thus, *Littleton* says, if a tenant in fee makes a lease for life, rendering rent, with a condition of re-entry on default of payment, and afterwards dies without heirs, in the life-time of the tenant for life, the lord by escheat cannot enter for the condition broken. f. 348.

§ 52. It should, however, be observed, that, in the case of conditions implied, or in law, privies and assignees in law may enter for a condition broken. Thus, Lord *Coke* says, if a man makes a lease for life, there is a condition in law annexed to it, that if the lessee

Exception.

1 Inst. 215 a.

creates a greater estate, &c. then the lessor may enter. Of this, and the like conditions in law, which give an entry to the lessor, not only the lessor himself and his heirs may take the benefit of it, but also his assignee, as lord by escheat.

None but the
Heir at Com-
mon Law
can enter.

1 And. 184.
2 ——— 22.

§ 53. None but the heir at common law can enter for a condition broken. Thus, if a person seised of lands in right of his mother, makes a feoffment in fee of them upon condition, and dies, and afterwards the condition is broken, the heir, on the part of the father, shall enter. For though the estate does not descend to him, yet the right of entry for the condition broken, which was created by the feoffment, and reserved to the feoffor and his heirs, descended on him. But when he has entered, the heir on the part of the mother may enter upon him.

Rob. Gav.
119.
Godb. R. 3.

§ 54. If a condition be annexed to an estate held in gavelkind, and is afterwards broken, the heir at common law must enter for the breach: but after such entry, all the younger sons shall enjoy the estate with him.

Of the Stat.
32 Hen. 8.

§ 55. Upon the dissolution of the monasteries by *Henry 8.*, most of their estates were granted to private persons, who could not take advantage of the conditions contained in the leases, which had been formerly made of those estates. This produced the statute 32 *Hen. 8. c. 34.*, by which it is enacted, “ that all per-
“ sons and bodies politic, their heirs, successors, and
“ assigns, which have or shall have any gift or grant
“ of

“ of the king of any lordships, manors, lands, &c.
 “ which did belong or appertain to any of the monas-
 “ teries, &c. or which belonged to any other persons,
 “ &c. and also all other persons being grantees or af-
 “ signees to the king, or to any other person or per-
 “ sons, and the heirs, executors, successors, and af-
 “ signs of every of them, shall and may have the like
 “ advantage by entry, for nonpayment of rent, for
 “ doing waste, or other forfeiture; and the same re-
 “ medy by action only, for not performing other con-
 “ ditions, covenants, and agreements, contained in
 “ the said leases, against the lessees and grantees, their
 “ executors, administrators, and assigns, as the lessors
 “ and grantors, their heirs and successors, ought,
 “ should, or might have had at any time or times.”

§ 56. Lord *Coke* states the following judgments and reasonings made on this statute. 1st, That the statute is general, *viz.* that the grantee of the reversion of every common person, as well as of the king, shall take advantage of conditions: 2d, That this statute extends to grants made by the successors of the king, although the king be only named in the act: 3d, That where this statute speaks of lessees, it does not extend to gifts in tail: 4th, That where the statute speaks of grantees and assignees of the reversion, an assignee of part of the estate of the reversion may take advantage of the condition; as, where such reversion is granted for life, or for years only, such grantee may take advantage of a condition: 5th, If a lessor bargains and sells the reversion by deed indented and inrolled, the bargainee is not in the *per* by the bargainor; and yet

1 Inst. 215 a.

he is an assignee within the statute. It is the same, if the reversion is conveyed by grant: but those who come in by act in law, as lord by escheat, cannot take any benefit from this statute: 6th, Although the words of the statute are “for nonpayment of rent, or for “doing of waste or other forfeiture,” yet the grantees or assignees shall not take benefit of every forfeiture by force of a condition, but only of such conditions as either are incident to the reversions, as rent, or for the benefit of the estate, as for not doing waste; for keeping the houses in repair, &c. and not for the payment of a sum in gross, or things of that nature.

Vide 1 Inst.
215 b. n. 1.

A Condition
cannot be ap-
portioned.

4 Rep. 120.
5 — 54.

§ 57. A condition being entire, cannot, in general, be apportioned, by the act of the parties; and, therefore, an assignee of part of the lands, in reversion, cannot take advantage of the condition: so that, if a lease be of three acres upon condition, the assignee of the reversion of two acres cannot enter for the condition broken.

Exception.

1 Inst. 215 a.

§ 58. There are, however, two cases, in which Lord Coke says, a condition may be apportioned. 1st, By act in law, as if a person seised of two acres, the one in fee, and the other in borough *English*, has issue two sons, and leases both acres for life, or years, upon condition; the lessor dies; in this case, by the descent, which is an act in law, the reversion and condition are divided: 2d, By act and wrong of the lessee, as if a lessor makes a feoffment of part, and the lessor enters for the forfeiture. There the condition shall be apportioned; for no one shall take advantage of his own wrong.

§ 59. Where

§ 59. Where a person enters for a condition broken, the estate becomes void *ab initio*, and the person who enters becomes again seised of his original estate, and is in the same situation as if he had never conveyed it away. And as the entry of the feoffor, on the feoffee, for a condition broken, defeats the estate to which the condition was annexed, so it defeats all rights and incidents annexed to that estate, and all charges and incumbrances created by the feoffee, during his possession. For upon the entry of the feoffor, he becomes seised of an estate paramount to that which was liable to those charges.

Effect of an Entry for a Condition broken.

Lit. f. 325.
1 Inst. 202 a.

§ 60. In consequence of this principle, if a man seised of a conditional estate, marries, or a woman seised of such an estate, takes a husband, and has issue, and afterwards the condition is broken, and the grantor enters for the breach, he will avoid all titles of dower and curtesy.

1 Roll. Ab. 474.

§ 61. In the same manner, if a person having an estate on condition, grants a rent charge out of the land, or acknowledges a statute or judgment, and afterwards the condition is broken, and the feoffor enters for the breach, he shall avoid all those incumbrances.

§ 62. Although, in general, a person who enters for a condition broken, becomes seised of his old estate, yet Lord Coke mentions some cases where this cannot be, on account of the alterations which have happened in the mean time.

1 Inst. 202 a.

Does not
defeat Copy-
hold Grants.

4 Rep. 24 a.
Co. Cop.
f. 34. Gilb.
Ten. 200.
Jenk. 243.

Tit. 10. ch. 2.
l. 26.

§ 63. An entry for a condition broken does not defeat copyhold grants; and, therefore, if a man makes a feoffment in fee of a manor upon condition, and the feoffee grants estates by copy, and afterwards the condition is broken, and the feoffee enters for the breach, yet the grants by copy made by the feoffee, even after the breach of the condition, shall stand good: for the feoffee was *legitimus dominus pro tempore*; and the copyholder does not claim his estate from the lord's grant, but from the custom.

Gilb. Ten.
201.

Ante, f. 45.

§ 64. If, however, a lease be made of a manor for years only, upon condition, and the condition is broken, no copyhold grants made after the breach of the condition will bind the lessor; because the estate of the lessee became absolutely void by the breach of the condition, without entry.

Distinction
between a
Condition
and a Limi-
tation.

1 Inst. 214 b.

§ 65. Lord *Coke* mentions a distinction between a condition that defeats an estate, but requires a re-entry; and a limitation, which determines the estate *ipso facto* without entry. Of the first sort, it has been shown, that a stranger cannot take advantage; but of limitations it is otherwise. As, if a man makes a lease *quousque*, that is, until *J. S.* returns from *Rome*, the lessor grants over the reversion to a stranger. *J. S.* returns from *Rome*. The grantee of the reversion may take advantage of the return of *J. S.* and enter, because the estate was determined by an express limitation.

§ 66. So it is, if a man makes a lease to a woman **Id.**
quamdiu casta vixerit, or if a man makes a lease for life
to a widow *si tamdiu in pura viduitate vixerit*. So, if a
man makes a lease for 100 years, if the lessee lives so
long, the lessor grants over the reversion and the lessee
dies, the grantee of the reversion may enter,

TITLE XIV.

ESTATES BY STATUTE MERCHANT, &c.

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|---|--|
| <p>§ 1. <i>Of Estates held as a Security for Money.</i>
 2. <i>Land not originally subject to the Payment of Debts.</i>
 6. <i>Statute of Aſon Burnell.</i>
 8. <i>Of a Statute Merchant.</i>
 10. <i>Of a Statute Staple.</i>
 13. <i>Of a Recognizance.</i>
 14. <i>Of Execution upon a Statute or Recognizance.</i>
 20. <i>Of the Writ of Elegit.</i>
 25. <i>Of the Inquisition.</i></p> | <p>§ 30. <i>The Estate must be executed by Entry.</i>
 36. <i>What may be extended.</i>
 45. <i>These Estates are only Chattels.</i>
 47. <i>The Tenants are not punishable for Waste.</i>
 48. <i>Remedies in case of Eviction.</i>
 53. <i>Duration of these Estates.</i>
 56. <i>How they are determined.</i></p> |
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Section I.

Of Estates
held as a
Security for
Money.

I SHALL now proceed to explain the nature of those estates which are held as a pledge or security for the re-payment of money, of which there are two kinds: The one, where the creditor acquires the estate by some legal and compulsory process; and the other, where the estate is conveyed by the debtor to the creditor, as a pledge for securing the re-payment of the money borrowed. The first kind are called *estates by statute merchant, statute staple, and elegit*, and owe their rise to the following circumstances.

Land not
originally
subject to
Debts.

2 Saund. 68 a.
n. 1.

§ 2. Upon the introduction of the feudal law into *England*, the feudatory was not only prohibited from alienating his land, but also from charging it with the payment of his debts; because this might tend to disable him

him from performing his military service. The goods and chattels of the debtor, therefore, and the annual profits of his lands, as they arose, were the only funds which the law allotted for the payment of his debts ; and this was thought the more reasonable, because nothing more than a chattel being borrowed, the chattels only of the debtor ought to be liable to the payment of the debt, 3 Rep. 116.

§ 3. Although this law was well suited to the situation of a warlike nation, who cultivated their own lands, and lived upon the produce, yet it was no ways calculated for a trading people, where it is a material object to create an extensive credit, which can only be done by making every kind of property subject to the payment of debts ; and, therefore, when about the reign of Henry 3. the *English* began to acquire some little foreign trade, the inconvenience of this doctrine began to be felt.

§ 4. The king's prerogative indeed formed an exception to this rule, for he might always have had execution of the real estate, goods, and chattels of his debtor ; but still, under this restriction, inserted in *Magna Charta*, ch. 8., that the land was not extendible where the chattels were sufficient, and the debtor ready to answer the debt. 3 Rep. 124. 2 Inst. 18.

§ 5. In the case of a private person, the land was also liable to execution in an action of debt against the heir, upon an obligation made by his ancestor, although, in such a case, the creditor could not have had execution 3 Rep. 124.

cution against the ancestor himself. The reason given by Lord *Coke* for this practice is, that as the common law had provided an action of debt against the heir, if the creditor could not have execution of the land, the action would have been useless, for the goods and chattels of the ancestor belonged to his executors.

Statute of
Acton Burnell.

§ 6. Thus stood the common law until the reign of *Edward* 1. when great complaints having been made by foreign merchants respecting the difficulties they met with in the recovery of their debts, which had occasioned several of them to withdraw themselves from the kingdom, the statute of Acton Burnell *de Mercatoribus* was made in 11 *Edward* 1., by which the chattels and devisable burgages of the debtor might be sold for the payment of his debts.

13 Ed. 1.
ft. 3. c. 1.

§ 7. In consequence of several complaints that sheriffs misinterpreted this statute, and delayed the execution of it, the king, in the parliament held at *Westminster* 13 *Edward* 1., caused it to be rehearsed before him; and, as a farther security to merchants, a new statute was made, by which it was enacted, that every merchant to whom money was due, should cause his debtor to come before the mayor of *London*, or some chief warden of a city, and before one of the clerks, that the king should thereto assign, who should acknowledge the debt and the day of payment; and this acknowledgment should be inrolled by one of the clerks, and the roll should be double, whereof one part should remain with the mayor and the other with the clerk; and one of the said clerks should write an obligation,

ligation, to which the seal of the debtor should be put, together with the king's seal ; and if the debtor did not pay at the day limited, all his lands should be delivered to the merchant, to hold to him until such time as the debt was wholly levied. And the merchant should have such seisin in the lands and tenements delivered to him or his assigns, that he might maintain a writ of novel disseisin if he was ousted.

§ 8. This species of security is called a *statute merchant*, and may be described to be a bond or contract upon record publicly acknowledged before the proper officer, and attested by the king's seal.

Of a Statute Merchant.

2 Saund. 68 a. n. 1.

§ 9. The addition of the king's seal, which was never required to any contract at common law, was made in order to authenticate and render the security of a higher nature than any other then known ; for by this the king, in the person of the mayor, attests the contract, and takes immediate cognizance of the debt, and, consequently, execution is to be awarded upon failure of payment on the day assigned, without any mesne process to summon the debtor, or the trouble or charge of bringing proofs to convict him. For judges require these on common contracts to satisfy themselves of the justice and legality of the plaintiff's demands, before they award any execution against the defendant : but to this contract the king himself is a witness, and there is besides the acknowledgment and confession of the debtor that he really owes so much, which is the best and strongest evidence of the fact ; and therefore immediate execution is granted.

§ 10. Another

Of a Statute
Staple.

§ 10. Another species of security, of a similar nature in many respects to a statute merchant, is a statute staple; to explain which it will be necessary to premise, that in the reign of *Edward 3.* it was thought expedient to confine the sale of all *English* commodities, which were to be exported, to certain great towns in *England*, which were called the *estaple* or *staple*, where foreigners might resort to purchase; and that no *Englishman* should, under great penalties, export these commodities himself. Upon this principle was made the statute of the staple, 27 *Edward 2.* stat. 2., containing a number of regulations for the establishment and government of the staple.

§ 11. This statute directs a proceeding similar to that which was prescribed for obtaining a statute merchant. The mayor of the place is empowered to take recognizances of debts, which any one makes before him, in the presence of the constables of the staple. There was to be, in every staple, a seal to be kept by the mayor, and all obligations, made upon such recognizances, were to be sealed with that seal; and in consequence of this sealed obligation, execution might be obtained against the lands and tenements of the debtor in the same manner as under a statute merchant; so that the creditor should have a permanent interest in the lands and tenements thus delivered to him, and a right to recover them, if ousted, by a writ of novel disseisin.

§ 12. A statute staple is therefore a bond of record, acknowledged before the mayor of some trading town,
attested.

attested by the public seal, kept for that purpose ; and although both the statute merchant and statute staple were originally intended for the benefit of merchants only, yet as they were obtained without any great trouble or expence, they became generally adopted, as a common mode of security.

§ 13. The practice of obtaining statutes staple, of persons not concerned in trade, became so universal, that an act was made in 23 Hen. 8. c. 6. prohibiting any persons but merchants from taking these statutes. But this statute created a new kind of security called a *recognizance*, in the nature of a statute staple, which is a bond acknowledged before the justices of the King's Bench or Common Pleas, the mayor of the staple at *Westminster*, or the recorder of *London* ; upon which the same process, execution, and advantage, in every particular, may be had, as upon a statute merchant, or statute staple.

Of a Recognizance.

By the statute of frauds, and the 8 Geo. 1. c. 25., several regulations are made respecting the inrolment of statutes and recognizances.

§ 14. Where the money borrowed upon the security of a statute merchant, staple, or recognizance is not paid, the cognizee or creditor is entitled to a writ of execution, by which the lands of the debtor are delivered to him upon a reasonable extent, that is, upon a reasonable valuation to be made by a jury, upon a writ of *extendi facias* ; with this difference, that, upon a statute merchant,

Of Execution upon a Statute or Recognizance.

2 Roll. Ab. 475. pl. 20, 21, 22.

chant, the sheriff may deliver the lands to the cognizee immediately : but, upon a statute staple or recognizance, the sheriff must first seise the lands into the king's hands, and then the cognizee must have a *liberaté* to get them : so that, in this respect, a statute merchant is preferable to a statute staple or recognizance.

2 Roll. Ab.
472. pl. 3.

§ 15. If the debtor sells all or any part of his lands, after he has acknowledged a statute or recognizance, still the cognizee may extend them, by the words of the statute ; otherwise it would be in the power of the cognizor to frustrate the security.

Winch. R.
83.

§ 16. Even lands purchased after the acknowledgment of a statute, are bound by it. For the statute says, that all the lands of the cognizor shall be extended.

1 Roll. Ab.
472.

§ 17. Although all the lands of the cognizor are liable to be extended, yet, if the cognizee only takes part of the lands, it will be good : for he may dispense with the rigour of the statute, if he pleases.

3 Rep. 12 b.

§ 18. But where the cognizor, after the acknowledgment of the statute, conveys the lands to several persons, the cognizee must then sue out execution of all the lands : for it would be unreasonable to load one of the purchasers only with the whole debt, when the burthen ought to be equally distributed on all the lands ; and, therefore, the person grieved may relieve himself by writ of *audita querela*.

§ 19. An

§ 19. An alien friend merchant may, upon a statute, extend lands which the king shall not have upon office, and for which he shall have an assize in case of ouster: for the main end and design of the statute merchant, and statute staple, was, to promote and encourage trade, by providing a sure and speedy remedy for merchant strangers, as well as natives, to recover their debts.

Dyer, 2 b. pl. 8. in Marg.

§ 20. I shall now proceed to explain the origin and nature of a writ of *elegit*. By the common law, in all actions where money alone was recovered, satisfaction could only be had of the goods, chattels, and growing profits of the defendant's lands, but not the possession of the lands. This was a natural consequence of the feudal principles, which prohibited the alienation, and, of course, the incumbring a feud with debts: when the restrictions on alienation were taken away, this consequence still continued; and no creditor could take possession of lands, but only levy the growing profits: so that, if the defendant aliened his lands, the plaintiff lost even that remedy.

Of the Writ of *Elegit*.

2 Saund. 68 a.

Ante, l. 2.

§ 21. By the statute *Westminster 2. 13 Edw. 1. c. 18.* it was enacted, that when a debt was recovered or acknowledged, or damages adjudged in the king's courts, the plaintiff should have his election, either to have a writ of *fieri facias*, or else that the sheriff should deliver to him all the chattels of the debtor, (saving only his oxen and beasts of the plough), and the one half of his lands, until the debt was levied, upon a reasonable price or extent.

2 Inst. 394.

Id.
1 Inst. 298 b.

§ 22. In pursuance of this statute, a new writ of execution was framed, called an *elegit*, from the words of the writ: and if a plaintiff prayed this writ, the entry on the roll was, *quod elegit sibi executionem fieri de omnibus cattallis, et medietate terræ*. Thus, was a moiety of a person's lands made liable to the payment of his debts, contrary to the original policy of the feudal institutions.

§ 23. The words of the statute are; *Cum debitum fuerit recuperatum, vel in curia regis recognitum*. This last expression gave rise to a practice now grown very common: when money is borrowed, the debtor not only executes a bond to the creditor, but also, a warrant of attorney addressed to one or more attornies of one of the courts at *Westminster*, authorising him or them to acknowledge a judgment on the bond; and when such judgment is acknowledged, it enables the creditor to sue out a writ of *elegit*, as effectually, as if it had been obtained in an adversary suit.

Doe v. Carter,
8 Term R.
61. 300.

§ 24. In a modern case, Lord *Kenyon* said, he saw no difference between a judgment that was obtained in consequence of an action resisted, and a judgment that was signed under a warrant of attorney; since the latter was merely to shorten the process, and to lessen the expence of the proceedings.

Of the In-
quisition.

§ 25. When a writ of *elegit* is sued out, the sheriff is to impanel a jury, who are to make inquiry of all the goods and chattels of the debtor, and to appraise the
the

the same, and, also, to inquire as to his lands and tenements; and upon such inquisition, to set out and deliver a moiety of the lands to the plaintiff, by metes and bounds.

§ 26. It was formerly held in some of the books, that, upon an *elegit*, the sheriff was obliged to deliver a moiety of each particular farm and tenement. But in a modern case, the Court of King's Bench determined, that the return was good, although separate lands were extended, provided it did not appear that they amounted in value to more than a moiety of the whole: for, otherwise, not only a moiety of every farm and tenement, but even a moiety of every close and field, must be delivered to the creditor. Nor could the writ be executed according to this idea, but by delivering an undivided moiety, which is entirely contrary to the meaning of the statute: for the moiety to be extended, must be set out by metes and bounds.

Denn v. Ld. Abington,
Doug. R.
473.

§ 27. If the sheriff delivers more than a moiety of the debtor's land, and this appears upon the return, the execution is totally void; for the sheriff has only a circumscribed authority, which he cannot exceed; and what is extended beyond a moiety, being without authority, and there being no possibility of separating it from the rest, the whole is void, as if nothing had been extended. But *Carthew*, in his report of this case, makes Lord *Holt* say, that the inquisition is not void, but voidable only by error, or an *audita querela*.

Putten v. Penbeck,
1 *Salk.* 563.

Gilb. Ex. 56.
Att Gen. v.
Andrews,
Hard. R. 23.

§ 28. Although no more than a moiety of the lands of a debtor can be taken by *elegit*, yet, if two judgments are obtained by the same person, he may extend both moieties, and it will be good.

Huyt v.
Cogan, Cro.
Eliz. 482.

§ 29. But if *A.* and *B.* recover severally against *C.*, and *A.* sues out an *elegit* and has a moiety of the lands delivered to him, and then *B.* sues out an *elegit*, he can only have a moiety of the lands which remain, and not the whole.

The Estate
must be ex-
ecuted by
Entry.

§ 30. The estate acquired by the execution of a statute, recognizance, or judgment, must be executed by an actual entry of the cognizee; for, until entry, he has but a bare right, which is not assignable: so that, although he should release all his right to the land, he may extend it after. All he acquires, is a lien on the land; but it is not certain whether he may ever make use of it, for he may recover the debt out of the goods of the cognizor, by a *scire facias*, or take his body; and then, during the debtor's life, he can have no execution.

1 Cha. Ca.
268.

Hannam v.
Woodford,
4 Mod. 48.
1 Salk. 563.
3 Lev. 312.

§ 31. Upon the death of the cognizee of a statute, his administrator sued out an extent, and the *liberate* being returned, he assigned over the lands, without making any actual entry. The question was, whether the assignment was good or not.

It was determined that the assignment was void, for by the return of the *liberate*, he had accepted the possession, and was estopped to say the contrary. Then,
when

when the owner still continued in possession, it turned the possession which the administrator had accepted by the *liberate*, to a mere right, and such right was by no means assignable; nor was it like an *interesse termini*, which the lessee might assign over before entry; because, in that case, the lessor is the principal agent, and hath done every thing on his part to transfer an interest to the lessee, which he may execute at pleasure.

Tit. 8. ch. 1.
s. 18.

§ 32. The sheriff does not now, as formerly, deliver actual, but only legal, possession, of a moiety of the lands; and, in order to obtain actual possession, the plaintiff must proceed by ejectment; in which, he must not only prove the judgment, and by the judgment roll, that an *elegit* issued, and was returned, but he must also prove the writ of *elegit*, by a true copy thereof, and also the inquisition, which was taken thereon.

2 Saund. 69c.
n. 3.

§ 33. Where a plaintiff in ejectment claims under an *elegit*, and there is a person in possession under a lease made prior to the judgment under which the *elegit* was sued out, he cannot recover.

§ 34. In ejectment, the plaintiff claimed under an *elegit* against *Wharton*. An objection was taken at the trial by the defendants, that the tenant in possession enjoyed under a lease granted to him by *Wharton* prior to the date of the plaintiff's judgment, and, therefore, that the plaintiff could not succeed in this ejectment. To this, it was answered on the part of the lessor of the plaintiff,

Doe v.
Wharton,
8 Term R. 2

plaintiff, that he had given the tenant notice that he did not mean to disturb the tenant's possession, his object being only, to get into the receipt of the rents and profits of the estate; and that the defendants ought not to be permitted to set up this objection. But Mr. Justice *Lawrence*, before whom the cause was tried, was of opinion, that the party who had the legal estate must prevail in an ejectment; and that, as the tenant's title accrued prior to that of the lessor of the plaintiff, the latter could not succeed in this ejectment. The Court of King's Bench was clearly of the same opinion.

§ 35. This determination has given rise to a tract, intituled, "*Observations on the Proceedings by Elegit*," written by Mr. *Lefroy*, a gentleman of the *Irish* Bar; in which it is contended, that where there are subsisting leases prior to the judgment, the conuzee may extend the reversion and rent by his elegit, and after such extent, may, without the usual process of ejectment, have all such remedies to recover a moiety of the rent, as the conuzor himself might have had for the whole, before the extent, or will have after it, for the other moiety.

This proposition is supported with great learning and ability, and will most probably be adopted by the courts of law.

What may be extended.

§ 36. With respect to the kind of property which may be extended, not only freehold estates are subject to be taken under writs of elegit, but also rent charges, and all other hereditaments, arising out of lands. And by

by the statute of frauds, 29 Cha. 2. c. 3., trust estates may be taken under *elegits*, for the payment of debts due by the *cestuique* trust, and held discharged from the incumbrances of the trustee.

§ 37. An estate tail may be extended during the life of the tenant in tail. But if execution be sued out against the issue, upon a statute or judgment, acknowledged by the father, the issue may avoid it by assize or *audita querela*; because a tenant in tail can only charge his estate during his life. Cro. Ja. 85. Ante, Tit. 2. ch. 2. f. 23.

§ 38. The sheriff may, upon an *elegit*, either extend a term for years, that is, deliver a moiety thereof to the creditor, as part of the debtor's lands, or may sell it absolutely, as part of his personal estate. 1 Inst. 395.

§ 39. Lands held in ancient demesne, may be extended by *elegit*, but not copyholds; for, in that case, the lord might have a tenant brought into the manor, without his admittance or consent. So that, if a judgment be obtained in a court of record against a copyholder, the plaintiff cannot have execution of a moiety of his copyhold estate by writ of *elegit*, because copyholds are not within the statute of *Westminster the second*. 2 Inst. 397. Co. Cop. Sup. f. 21. 3 Rep. 9 a.

§ 40. A rent seck, advowson in gross, or glebe, belonging to a parsonage or vicarage, cannot be extended by a creditor, under a writ of *elegit*. Cro. Eliz. 656. Gilb. Ex. 39.

f. 36.

§ 41. It has been already stated, that trust estates are, by the statute of frauds, 29 Cha. 2. c. 3. f. 10., made subject to the debts of the *cestuique* trust; but that execution must be sued against the trustees while they are seised of the land. For, after a conveyance by the trustees to the *cestuique* trust, they cannot be taken in execution, by any process issued against the trustees. But if a trustee confesses a judgment or statute, though at law, these are liens upon the estate, yet, in equity, they will not affect it, because a judgment is only a general security, not a specific lien upon the land.

1 P. Wms.
278.

Finch v. Earl
of Winchelsea, 1 P.
Wms. 277.

§ 42. Lord Cowper is reported to have said, that
 “ articles made for a valuable consideration, and the
 “ money paid, will, in equity, bind the estate, and
 “ prevail against any judgment creditor *mesne* between
 “ the articles and the conveyance. But this must be
 “ where the consideration is adequate to the thing
 “ purchased; for, if the money paid is but a small
 “ sum in respect of the value of the land, this shall not
 “ prevail over a *mesne* judgment creditor.”

This doctrine can only be supported upon the principle, that, by the execution of the articles, the person agreeing to sell, becomes a trustee for the intended purchaser.

§ 43. A judgment binds all the freehold lands whereof the person against whom it is obtained is seised at the time; and no subsequent act of the debtor, not even

even an alienation for a valuable consideration to a purchaser, who has no notice of the judgment, will avoid it. A judgment, also, binds all the lands which are afterwards acquired by the debtor.

§ 44. It has been the general opinion, ever since the statute of frauds, that a term for years is not affected by a judgment, until a writ of execution is actually sued out and delivered to the sheriff. But this doctrine has been lately controverted by Mr. Serjeant Hill.

Vide Rigge on Registers, 90.

§ 45. Upon the entry of the cognizee into the lands extended, he is called *tenant by statute merchant, statute staple, or elegit*: and, although the estates thus acquired, are uncertain as to their duration, being determinable only on payment of the debt, and, although persons holding such estates, shall have the same remedy by assize as freeholders, yet they are but chattels, and, as such, vest in executors or administrators.

These Estates are only Chattels.

1 Inst. 42 a.

2 — 396.

§ 46. It was formerly held, that these estates, like terms for years, might be barred by a recovery suffered by the persons who had the freehold. But by the statute 27 Hen. 8. c. 15., they are protected from the effects of a recovery,

Vide Tit. 36.

§ 47. Persons holding estates of this kind, are not punishable for waste, by the statute of Gloucester. But if tenant by elegit commits waste, an action of account will lie against him; and the debtor shall have a *venire facias*

The Tenants are not punishable for Waste.

Bro. Ab. Tit. Elegit, pl. 7. 20.

6 Rep. 37 a.
1 Inst. 57 a.
B. 1.

facias ad computandum, for the waste, and shall recover damages for the surplus.

Remedies in
case of Evic-
tion.

§ 48. With respect to the remedies given to tenant by statute merchant, in case of eviction, the statute 13 Edw. 1. gave him a writ of novel disseisin, in case his possession was disturbed: but if the eviction was upon good title, the cognizee had no further remedy.

§ 49. By the common law, after a full and perfect execution had by extent returned, and entered on record, the cognizee could have no new extent on the effects of the cognizor; because there was once satisfaction given to the creditor on record, though the lands had been recovered from him before he had levied his debt.

1 Inst. 290 a.

§ 50. This doctrine was altered by the statute 32 Hen. 8. c. 5., by which, it was enacted, that if lands delivered in execution on just cause, be taken from the tenant before he hath recovered his whole debt, the cognizee (and, by a favourable construction of the statute, his executors, administrators, or assigns), may have a *scire facias* out of the court where execution was awarded, or out of any court, to which the record is moved by writ of error, and affirmed, and a new writ of execution against the other lands of the cognizee.

1 Inst. 289 b.

§ 51. Upon the construction of this statute, it was resolved, that where the cognizee has a remedy for
part

part of his debt, *in presenti*, or for the whole or part, in future, he cannot derive any benefit from this statute. Thus, if all the lands extended be recovered from the cognizee, except one acre, he cannot have a new writ of execution under the statute; because the act only extends to those who are deprived of all remedy, which is not the case while one acre remains.

§ 52. This inconvenience seems, however, to be removed by the statute 8 Geo. 1. c. 25. s. 4., which enacts, that in case it is made appear to the Court of Chancery, that sufficient has not been extended to satisfy the recognizance, or that any omission, error, or mistake has happened, in making, suing out, executing, or returning, any of the said writs; or should it happen, that any of the said lands, &c. shall hereafter be evicted, that then, and in every such case, the said Court of Chancery shall and may award one or more re-extent or re-extends, and writs of *liberate* may be sued out thereupon.

§ 53. As to the duration of these estates, the law allows the creditor to hold them until he has received all the money due to him. And in the case of a statute, he is also entitled to costs; and, as the sheriff is directed to make a reasonable extent of the land, it follows that, upon a computation of the debt, and the value of the lands, it will be easily known how long the extent may continue, and when the debtor will be entitled to have his land again.

Duration of
these Estates.

There

There are, however, some cases in which the creditor may hold over the time of the extent.

4 Rep 82
a & b.
2 Roll. Ab.
478.

§ 54. In case of any disseisin or interruption by a stranger, the cognizee shall not hold over the time of the extent, but is to have satisfaction for the injury done him, from such stranger. But if the cognizor himself gives the tenant by statute or *elegit* any interruption, or prevents him from taking the profits, there the tenant may either hold over, or bring an action against the cognizor. For as, in the first case, it would be unreasonable to punish the cognizor for the act of a stranger, by keeping him out of his lands, so, in the last case, it would be equally unreasonable to permit the cognizor, by any act of his own, to turn the cognizee out of the land, before he had received his debt.

Id.

§ 55. If the tenant, by statute or *elegit*, suffers the land to lie waste, or neglects to levy the debt out of it, these being his own acts, it is but reasonable he should suffer for them, and not hold over the land to the prejudice of the cognizor. But, on the other hand, where there is no fault or negligence in the cognizee, but he is prevented from making the usual profits of the land by the act of God, there the cognizee shall hold over the time of the extent; for it would be unreasonable to punish him for that which no industry of his could prevent.

How they
are deter-
mined.

§ 56. As to the manner in which estates of this kind may be determined, there is a considerable difference

ference between estates held by statute merchant, statute staple, or recognizance, and those held by writ of *elegit*.

§ 57. In the case of an extent under a statute, the cognizor cannot enter without suing out a *scire facias ad rehabendam terram*; because, in this case, the tenant is entitled to hold the land not only until the principal debt be levied, but also all costs, damages, and expences arising by reason thereof. And as the costs are not ascertained, no entry, which is but an act *in pais*, can defeat a matter of record, until such costs and damages are ascertained by writ of *scire facias*.

4 Rep. 67 a.
2 Roll. Ab.
479.

§ 58. But in the case of an *elegit*, where the debt is certain, (no damages or expences being allowed), and the annual value of the land is ascertained by the inquisition and extent, when a sufficient time has elapsed to enable the creditor to receive what was due to him from the rents, there is no reason to object to the entry of the cognizor, and it is therefore lawful.

4 Rep. 67 b.

§ 59. In the case of an *elegit*, if the cognizee is satisfied his debt, by some casual profit, the cognizor cannot enter, but must bring a writ of *scire facias*; because such accidental profit does not appear in the valuation of the lands settled upon record.

2 Roll. Ab.
479.

§ 60. No *scire facias* lies upon a general averment that the cognizee has levied the debt before the time of the extent expired; because this may happen by the
cognizee's

cognizee's industry in improving the land, of which the debtor cannot take advantage. But if the cognizee has levied part of the debt by the felling of timber, and has received the rest, as appears from an acquittance, the cognizor shall have a writ of *scire facias*. The reason is, because the object of the extent being only to satisfy the cognizee his reasonable demands, whenever it appears to the court that they are answered, whether it be by perception of the profits or otherwise, they will grant a *scire facias* to avoid the extent, and to reinstate the cognizor in his former possession; since the end for which it was given is answered.

Id.

§ 61. If the cognizee has levied part of the debt, according to the extent, the cognizor, upon tender of the residue in court, shall have a *scire facias* to recover possession of his land within the time of the extent: for here it appears on record how much was due at first, how much was paid, and what remains due. And the object of the extent being to satisfy the cognizee of his just debt, whenever that appears to the court to have been done, the estate shall cease. But if the cognizor had tendered the remainder of the debt out of court, or if in court he had only offered to come to an agreement with the cognizee, in neither of these cases would a *scire facias* be granted; because it did not appear upon record that the debt was paid.

Godfrey v.
Watson,
3 Ark. 517.

§ 62. A question having arisen in the Court of Chancery, whether, upon an *elegit*, the plaintiff would be

be allowed interest beyond the penalty of a judgment, Lord *Hardwicke* said, that at law, upon a judgment entered up, it is the *debitum recuperatum* and the stated damages between the parties. But if the creditor does not take out a *fiery facias* against the person of the debtor, or his personal estate, but extends the lands by *elegit*, which the sheriff does only at the annual value, and much below the real, the creditor holds *quousque debitum satisfactum fuerit*; and at law the debtor cannot, upon a writ *ad computandum*, insist upon the creditor's doing more than account for the extended value. But if the debtor comes into a court of equity for relief, the court will give it him, by obliging the creditor to account for the whole that he has received: and, as a person who comes for equity must do equity, will direct the debtor to pay interest to the creditor, even though it should exceed the principal. And his Lordship said, he remembered very well, upon Serjeant *Whitaker's* insisting before Lord Chancellor *Cowper* that this would be repealing the statute of *Westminster*, his Lordship said, he would not repeal the statute, but he would do complete justice, by letting the creditor carry on the interest upon his debt, as he was to account for the whole he had received.

Owen v.
Griffith,
Amb. 520.

§ 63. In the case of an extent under a statute, the only proper determination of the estate held under such extent is the entry of satisfaction upon the record; and a person, having a second extent, has no title of entry until then.

Deighton v.
Greenvill,
1 Show. 35.
Vide Tit. 35.

Title XIV. Statute Merchant, &c. § 64.

§ 64. In the case of an extent by the crown, the Court of Exchequer is empowered, by a modern act of parliament, 25 Geo. 3. c. 35., to sell the estate absolutely for payment of the debt.

TITLE XV.

MORTGAGE.

CHAP. I.

Of the Origin and Nature of Mortgages.

CHAP. II.

Of the several Interests of the Mortgagor and Mortgagee.

CHAP. III.

Of an Equity of Redemption.

CHAP. IV.

Of the Payment of the Mortgage Money.

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Of the Order in which Mortgages are to be paid, and the Means by which a Priority may be gained.

CHAP. VI.

Of Foreclosure.

CHAP. I.

Of the Origin and Nature of Mortgages.

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| <p>§ 1. <i>Origin of Mortgages.</i>
6. <i>Interposition of the Court of Chancery.</i>
10. <i>Description of a Mortgage.</i>
15. <i>Mortgages in Fee, and for Years.</i></p> | <p>19. <i>All Restraints on the Right of Redemption are void.</i>
32. <i>Where there is a new Agreement for a Purchase.</i>
38. <i>Cases of conditional Purchases.</i></p> |
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Section 1.

Origin of
Mortgages.

Lib. 10. c. 8.

Grand Coust.
ch. 20.

IT is not known, whether the practice of pledging lands as a security for the repayment of a sum of money borrowed, existed in the time of the Saxons. But in the reign of *Hen. 2.*, two modes of pledging lands were in use, which are fully described by *Glanville*, and appear to have been adopted from the customary law of *Normandy*.

§ 2. The first of these was called *vivum vadium*, and was a conveyance of lands by a debtor to his creditor, to hold until the rents and profits should amount to the sum borrowed; in which case, the pledge was said to be living, for, on discharge of the debt, it returned to the borrower.

§ 3. The second mode of pledging land was called *mortuum vadium*, and is thus described by *Littleton*, f. 332.: “ If a feoffment be made upon such condition, that if the feoffor pay to the feoffee 40*l.* of money, that then the feoffor may re-enter, &c. in this case, the feoffee is called *tenant in mortgage*, which is as much to say in *French*, as *mort-gage*, and, in *Latin*, *mortuum vadium*. And it seemeth, that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such sum or not; and if he doth not pay, then the land which is put in pledge, upon condition for the payment of the money, is taken from him for ever, and so dead to him upon condition.”

It

It appears from this passage, that a mortgage was created by a conveyance of the lands from the debtor to the creditor, with a condition, that if the money was paid on a certain day, the conveyance should be void, and the debtor might enter and have his former estate; but if default was made in payment of the money on the day appointed, then the lands became absolutely vested in the creditor, freed from the condition. And all the maxims of the common law, respecting the breach of a condition, were strictly applied to this kind of conveyance.

§ 4. This mode of pledging lands was attended with great inconvenience. If the money was not paid on the very day named in the deed, the lands were absolutely forfeited, and became liable to all the incumbrances of the creditor: nor would any subsequent tender of the money avail the debtor, although the estate mortgaged were of much greater value than the sum borrowed.

§ 5. Notwithstanding the obvious injustice of this doctrine, the courts of common law would not allow of the smallest degree of liberality in the construction of these kind of conditions; and, in the only two cases reported by Lord Coke respecting mortgages, the courts of common law appear to have held, that an estate mortgaged was absolutely forfeited, and lost, if the condition was not really and *bonâ fide* performed.

Goodall's case,
5 Rep. 95.
Wade's case,
Id. 114.

§ 6. The principles adopted by the courts of common law in respect to mortgages, being totally con-

Interposition
of the Court
of Chancery.

trary to the spirit of this species of contract, and to the good of the public, by subjecting those who borrowed money on the security of their lands, to the total loss of them, on the nonperformance of the condition, the Court of Chancery was induced to interpose, and, by an equitable and liberal construction, to mitigate the rigour of the common law, in cases of this nature.

§. 7. It was obvious, that lands mortgaged, were only meant to become a security for the payment of what was borrowed, and that it never could be the intention of a person who mortgaged his lands, that a large estate should become the absolute property of a creditor, if a sum of money much inferior to the value of such estate was not paid on the day appointed. The Court of Chancery, therefore, resolved, that a condition of this kind was in the nature of a penalty, against which equity ought to relieve; and that, all the creditor could, in justice and conscience be entitled to, was, his principal, interest, and costs. These considerations induced the Court of Chancery to establish it as a ruling maxim, that although the condition was not strictly performed, by which the estate was forfeited at law, yet, if the debtor paid the money borrowed, and interest, within a reasonable time, he should be entitled to call on the creditor for a reconveyance of his lands.

§ 8. This right acquired the name of an equity of redemption: but it is not ascertained when it was first allowed. Lord *Hale* is reported to have said, that in 14 Ric. 2., the parliament refused to admit of an equity

equity of redemption. But this is probably a mistake of the reporter; for, in the case to which Lord *Hale* alludes, the mortgagor asserted that he had paid the money, and prayed to have his lands again: nor did the idea of an equity of redemption exist for some centuries after. And although *Totbill* has mentioned a case in 37 *Eliz.*, where a mortgagor had a decree in chancery for a reconveyance of lands mortgaged, yet no mention is made in any part of Lord *Coke*'s works of an equity of redemption; from which, it may be certainly presumed, that it was not then generally established. It is, however, probable, that this doctrine was introduced in the reign of *James I.*, when the Court of Chancery had established its equitable jurisdiction; and, in the first year of *Charles I.* there is a case, in which this right is supported as a thing of course.

Rot. Parl.
vol. 3. 258.

Emanuel Col.
v. Evans,
1 Rep. in Cha.
10.

§ 9. After the allowance of an equity of redemption, there still remained some legal scruples, which subjected the mortgagor to great inconveniencies. It was conceived, that where the condition was not strictly performed, by the payment of the money on the day mentioned in the conveyance, the lands became liable to all the legal charges of the mortgagee; to the dower of his wife; to forfeiture and escheat; and that the mortgagor could have no relief against those who came in, in the post. But the Court of Chancery, as it encreased in power, has set this matter right, and has established the right of redemption, not only against tenant in dower, and all those who came in under the mortgagee, but also against the lord by escheat, and

Nash v.
Preston,
Cro. Car. 190.

all others who come in, in the post. Because, in equity, the payment of the money puts the mortgagor in *statu quo*, since the lands were originally conveyed as a security only for the money lent.

Description
of a Mort-
gage.

§ 10. A mortgage may therefore be described to be a conveyance of lands by a debtor to his creditor, as a pledge or security for the re-payment of a sum of money borrowed, with a proviso that such conveyance shall be void on payment of the money and interest on a certain day. And in all mortgages, although the money be not paid at the time appointed, by which the conveyance of the lands becomes absolute at law, yet the mortgagor has still a right in equity, on tendering to the mortgagee his principal, interest, and costs within a reasonable time, to call for a re-conveyance of the lands; which right is called *an equity of redemption*.

Forrest. 63.

Baker v.
Wind,
4 Ves. 160.

§ 11. It was formerly a practice to make a mortgage by an absolute conveyance, with a defeazance or clause of redemption in a separate deed. Lord *Talbot* has said of this practice, that it was a wrong way, and to him it always appeared with a face of fraud; for the defeazance might be lost, and then an absolute conveyance was set up: he would discourage the practice as much as possible. And Lord *Hardwicke* has said, that wherever the court finds a clause of redemption in a separate deed, it adheres to it strictly, to prevent the equity of redemption from being intangled, to the prejudice of the mortgagor.

§ 12. The

§ 12. The Court of Chancery having thus extended its protection to the mortgagor, by allowing him to redeem his estate after it was forfeited at law, it also gave the mortgagee a right, in a reasonable time after forfeiture, to call on the mortgagor for the payment of his money, or else to be for ever foreclosed, or excluded from any farther equity of redemption.

§ 13. As money borrowed on mortgage is seldom paid on the day appointed, mortgages are now become entirely subject to the Court of Chancery; and it is there laid down as a rule, that the mortgagee holds the estate merely as a pledge or security for the re-payment of his money; and therefore a mortgage, though in fee, (the legal estate in which descends to the heir at law), is considered in equity only as personal estate. The mortgagor is therefore held to be the real owner of the land, the debt being esteemed the principal, and the land the accessory; and whenever the debt is discharged, the interest of the mortgagee in the land determines of course, and he is looked upon in equity, merely as a trustee for the mortgagor.

§ 14. In all modern mortgages, there is a covenant inserted from the mortgagor, for himself, his heirs, executors, and administrators, to pay the money borrowed with interest; which creates a personal contract between the mortgagor and mortgagee for the payment of the money.

Mortgages
in Fee and
for Years.

§ 15. Mortgages are of two sorts : either the lands are conveyed to the mortgagee and his heirs, in fee, with a proviso that if the mortgagor pays the money borrowed on a certain day, the conveyance shall be void ; or else the lands are conveyed to the mortgagee, his executors, administrators, and assigns, for a long term of years, with a proviso that if the money is paid on a certain day, the term shall cease and become void.

§ 16. In the case of mortgages for years, if the money is not paid on the day appointed, the estate becomes vested at law in the mortgagee for the residue of the term ; and though a court of equity allows the mortgagor to redeem it within a reasonable time, by paying the mortgagee his principal, interest, and costs, yet such payment only gives the mortgagor an equitable right to the term, and the legal estate still continues in the mortgagee, who must re-convey it by a proper instrument.

Treat. of Eq.
b. 3. c. 1. f. 2.
note.

§ 17. Mortgages for years are attended with this advantage : that on the death of the mortgagee, the term, and the right in equity to receive the mortgage debt, vest in the same person ; whereas, in cases of mortgages in fee, the estate, on the death of the mortgagee, goes to his heir or devisee, and the money is payable to his executor or administrator. This produces a separation of rights, that is often attended with great inconvenience both to the mortgagor and mortgagee. On the other hand, in case of mortgages for

for years, there is this defect : that if the estate is foreclosed, the mortgagee will be only entitled to his term. To guard against which it has been thought advisable, in some cases, to make the mortgagor covenant that on non-payment of the money, he will not only confirm the term, but also convey the freehold and inheritance to the mortgagee, or as he shall appoint, discharged of all equity of redemption.,

Bac. Ab. Tit.
Mortgage,
(A.)

§ 18. There is another kind of mortgage, where the proviso for redemption does not oblige the mortgagor to pay the money on a particular day, but he is allowed to do it at any indefinite period of time,

Danby v.
Read, Finch
R. 226.
Vide Infra,
Howell v.
Price.

§ 19. When the Court of Chancery assumed a jurisdiction over mortgages, it became an established rule there, that every conveyance of a real estate, for the purpose of securing the re-payment of a sum of money only, should be considered as a mortgage ; and that all restraints imposed upon the equity of redemption, should be relieved against, being, in fact, terms extorted from the necessities of the borrower, and tending to usury and oppression.

All Re-
straints on
the Right of
Redemption
are void.

The right of redemption is therefore considered in equity as inseparably incident to a mortgage, and cannot be restrained by any clause or agreement whatever ; it being a rule that what was once a mortgage must always continue to be a mortgage,

§ 20. Thus, a proviso to redeem during the life of the mortgagor only, was held void ; and it was decreed,

Jason v.
Eyre, 2 Cha.
Ca. 32.

1 Vern. 192. decreed, that the heir of the mortgagor should redeem
Orde v. notwithstanding.
Smith, *Infra.*

§ 21. So, where the right of redemption was restrained to the mortgagor himself, or to the heirs of his body, it was held void; and a jointress was allowed to redeem.

Howard v.
Harris,
1 Vern. 33.
190.

§ 22. Lands were mortgaged with a special clause, that if the mortgagor; or the heirs males of his body, should pay the money borrowed, they might re-enter; and the mortgagor agreed, that no one but he or the heirs males of his body should be admitted to redeem.

The mortgagor died without issue, and the plaintiff, being a jointress of part of the mortgaged lands, brought her bill to redeem the mortgage.

It was insisted for the plaintiff, 1st, that restrictions of redemption, in mortgages, had always been discouraged; and it would be a thing of mischievous consequence should they prevail: for then it would become a common practice and a trade, amongst the scriveners, to fetter mortgagors so as to make it impracticable for them to redeem, according to the precise letter of the agreement. 2dly, It was a maxim in Chancery, that an estate cannot at one time be a mortgage, and at another time cease to be so, by one and the same deed; and a mortgage can no more be irredeemable, than a distress for a rent-charge irrepleviabie.

After

After long debate, the Lord Keeper decreed, that the mortgage should be redeemed; the rather because the defendant had a covenant for re-payment of his mortgage money.

§ 23. Where lands are mortgaged, no agreement made at the time that in case the money is not paid on the day appointed, the conveyance shall become absolute, will be allowed in Chancery.

§ 24. A person, being seised of lands worth 200 *l.* *per annum*, mortgaged the same in 1637, for 250 *l.* and executed a deed for the absolute conveyance of the premises to the mortgagee, if the money was not paid at the end of seven years. The Master of the Rolls, assisted by Mr. Justice *Hyde*, decreed a redemption; for the mortgagee's father having exhibited a bill against the mortgagor, for the land or the money, made it evident that it was a mortgage; and therefore no agreement could take away the right of redemption.

Bowen v. Edwards,
2 Rep. in Cha.
221.

§ 25. An agreement, that in case money, lent on mortgage, is not paid on the day appointed, then, that upon payment of a farther sum by the mortgagee, the conveyance shall become absolute, will not be allowed.

§ 26. A person mortgaged his estate for 200 *l.*, and at the same time entered into a bond, conditioned that if the 200 *l.* and interest was not paid at the day, then, if the mortgagee should pay the mortgagor the further

Willet v. Winnell,
1 Vern. 482.

further sum of 78 *l.* in full for the purchase of the premises within ten days afterwards, the bond should be void, or else should stand in force.

The mortgagor died before the mortgage became forfeited, leaving his son an infant; and the 200 *l.* not being paid at the day, the mortgagee paid the 78 *l.* The son of the mortgagor brought his bill to redeem. The defendant, by his answer, insisted that it was an absolute purchase. But the court decreed a redemption.

Jennings v.
Ward,
3 Vern. 520.

§ 27. The defendant, *Ward*, lent 16,000 *l.* to one *Neale*, on mortgage, to carry on his buildings; and in another deed, executed at the same time, he took a covenant from *Neale*, that he would convey to him, if he thought fit, ground rents to the value of 16,000 *l.*, at the rate of 20 years purchase. The bill being to redeem, the defendant insisted on that agreement; but the Master of the Rolls decreed a redemption, on payment of principal, interest, and costs, without regard to that agreement, setting it aside as unconscionable; for a man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any bye agreement.

§ 28. No subsequent agreement entered into by the creditors and assignees of a mortgagee, to restrain the right of redemption to a particular period, will be deemed valid in equity.

§ 29. A per-

§ 29. A person, having made a mortgage, and the equity of redemption being subject to the payment of several debts, the mortgagee exhibited his bill against the mortgagor and all the creditors, that they should redeem, or be foreclosed. *Greaves*, who was one of the defendants, and also a creditor, paid the mortgage money with the consent of the other creditors, and agreed with them, that if they would pay the money advanced by him, at a further day, they should redeem, otherwise that he should have the lands absolutely. The creditors failed to pay the money at the time agreed on. *Greaves* enjoyed the lands for 20 years; and afterwards the creditors exhibited their bill to redeem.

Exton v. Greaves,
1 Vern. 138.

The Lord Keeper decreed a redemption, because those lands, by the new agreement, became a mortgage, in respect of the other creditors, in the hands of the defendant; and in regard of the trusts and confidence which they had in the defendant; being all creditors alike: and, principally, because the mortgagee had assigned to *Graves* his mortgage only, and not the benefit of the decree for foreclosing the redemption.

§ 30. Although a mortgagee have a power to mortgage, or sell the lands mortgaged absolutely, in case of failure of payment at a given time, a court of equity will, nevertheless, consider any conveyance by such mortgagee to be subject to redemption, if it appear that the equity of redemption was excepted in the conveyance.

§ 21. Thus,

Croft v.
Powell,
Comm. Rep.
603.

§ 21. Thus, where a conveyance of lands was made, by lease and release, by *A.* to *B.* and his heirs, and by a defeazance, bearing date with the release, it was agreed, that if *A.* repaid 1000 *l.*, &c. borrowed of *B.*, and two other sums borrowed of other persons, which *B.* had taken upon himself to pay off within a year from the date of the indenture, then *B.* should reconvey to him; but if he failed to pay the money within the year, then *B.* should mortgage or absolutely sell the lands, free from redemption, and out of the money raised by such mortgage or sale, pay the said 1000 *l.*, &c. and interest, and be accountable for the overplus to *A.* and his heirs. A fine was also levied to *B.* in order to bar *A.*'s wife of dower. Afterwards, the money not being paid at the time stipulated, *B.* agreed to convey the estate for a certain sum of money; and in the agreement, and also in the conveyance, an exception was made, in which the defeazance was mentioned. Afterwards, a question arose, whether the purchaser had an absolute estate, or an estate redeemable. And it was contended that he had an absolute estate, for that the estate conveyed to *B.* was an absolute estate, and though there was a defeazance executed at the same time, yet that was to have operation only within a twelvemonth, after which period, *B.* was invested with a power to sell absolutely, free from all equity of redemption; consequently, it then became a trust for *B.* to sell: and where an estate was conveyed to trustees to sell, the vendee, by virtue of such sale, had an absolute estate, free from all charges and power of redemption. And the fine, it was said, passed the right of

of the then owners in the estate, and made it absolute. But it was answered, and resolved by the court, that the estate was redeemable; for the estate conveyed by *A.* to *B.* was, in its nature, a mortgage to him; and, though the money was not paid within the year, yet the mortgagor might still have redeemed at any time, while the estate continued in *B.*; and then, though *B.* had a power, on nonpayment within the year, to mortgage or sell in order to raise the money lent, and to be accountable for the overplus, it was not then to be considered what he might have done, but what he *had* done; and it was evident, that it was not *B.*'s. intention to convey an absolute and indefeasible estate, for he had not conveyed it absolutely, and free from the equity of redemption, but had insisted upon having the defeazance inserted. If, then, as was the case, *B.*, on nonpayment of the money within a year, stood as trustee for *A.*, subject to the defeazance, his (*B.*'s.) vendee coming in with notice of that trust, would stand in his place, and must be considered as taking the conveyance, liable, in equity, to the performance of the trust; and the fine made no difference, for it only operated to strengthen the estate, and free it from the dower of the wife, and confirmed it in *statu quo*, but did not discharge it from the equity of redemption, to which it was before liable.

§ 32. A distinction has been made by the Court of Chancery, between contracts originally founded upon lending and borrowing money, with an agreement for a purchase in a certain event, and cases where, after a mortgage, a new agreement hath been entered into, and

Where there is a new Agreement for a Purchase.

and executed by the parties, for an absolute purchase, although there be a subsequent declaration, that the mortgagor may have his estate upon payment of interest, principal, and costs; or, where a release of the equity of redemption is given, with a collateral agreement to reconvey, upon repayment of the purchase money: and, in the latter cases, it hath been determined, that no repurchase shall be had, unless upon a strict performance of the conditions stipulated.

Cotterel v.
Purchase,
Ca. Temp.
Talbot. 61.

§ 33. *A.*, a joint-tenant with *B.* her sister, made an absolute conveyance to *C.* in fee, for 104*l.*, which was admitted to be intended only as a mortgage; some time after, in 1708, those deeds were cancelled, and then *A.* in consideration of 184*l.* (including the 104*l.* paid by *C.*), conveyed the estate *ut supra*, but with a farther covenant, not to agree to any partition without *C.*'s consent. *B.* was in possession till 1710, when *C.* ejecting her out of the moiety, enjoyed it quietly till 1726; at which time, *A.* brought a bill for redemption, to which *C.* pleaded himself an absolute purchaser. The receipts given for the money, mentioned it to be purchase money. In 1710, there was an agreement, that *A.* might have the estate again, if desired, on payment of principal, interest, and charges. It was first heard before the Master of the Rolls, who dismissed the bill. Afterwards, it came on before Lord Chancellor Talbot, who observed the case was very dark: the first deed was admitted to be a mortgage, the second was made in the same manner, excepting the covenant respecting the partition, which was the darkest part of the case; for to suppose that it was an absolute conveyance,

conveyance, and to take a covenant from one who had nothing to do with the estate, made both the covenant and parties vague and ridiculous; but that it would be equally so, if the deed was supposed to be an actual conveyance, so that it was of no great weight, and ought to be laid out of the question: that he was inclined, upon the whole, to think the conveyance in 1708, was at first an absolute conveyance. The agreement in 1710 for the repurchase, shewed it was not redeemable at first; the acquiescence of 16 years upon C's. possession, was a strong evidence of it; and his Lordship, upon the circumstances of the case, affirmed his Honour's decree.

§ 34. Lands in *Wales* were mortgaged for 400 l., and afterwards, neither principal nor interest being paid at the time limited, the mortgagee brought an ejectment, got possession of the premises, and then obtained a release of the equity of redemption from the mortgagor, upon payment of 350 l. more. A note was given at the time of executing the release, that the releasee, on payment of the 750 l., and all charges of repairs, within a year, by the releasor, should sell and convey to him the premises. Payment having been neglected for 16 years, redemption was not allowed, the note being considered as an original agreement between the parties to sell and convey the premises upon the terms therein mentioned, but not that the releasor should be at liberty to redeem the same.

Endsworth
v. Griffith,
15 Vin. Ab.
468. 2 Eq.
Ca. Ab. 595.

This decree was, upon appeal, affirmed by the House of Lords.

5 Bro Parl
Ca. 184.

§ 35. Where money is lent by one relation to another, with a proviso, that if the money is not repaid on a certain day, the land shall be settled in a particular manner for the benefit of the family; a court of equity will not decree a redemption.

Bonham v.
Newcomb,
2 Vent. 364.
1 Ab. Eq.
312.

§ 36. *A.*, in consideration of 1000 *l.*, made an absolute conveyance to *B.* of the reversion of certain lands after two lives, which at that time were worth little more; and, by another deed of the same date, the lands were made redeemable at any time during the life of the grantor only, on payment of 1000 *l.*, and interest. *A.* died not having paid the money; and it was held by my Lord *Nottingham*, that his heir might redeem, notwithstanding this restrictive clause; and that it was a rule, *once a mortgage always a mortgage*, and that *B.* might have compelled *A.* to redeem in his life-time, or have foreclosed him. But, on a rehearing, Lord Keeper *North* reversed the decree, on the circumstances of this case; for it appeared by proof, that *A.* had a kindness for *B.*, and that he had married his kinswoman, which made it in the nature of a marriage settlement: he likewise held, that *B.* could not have compelled *A.* to redeem during his life, which made it the more strong.

King v.
Bromley,
2 Ab. Eq.
595.

§ 37. *A.* seised of a copyhold in fee, surrendered it upon his marriage, to the use of himself and his wife in special tail, remainder to her in fee, upon condition that, if he paid 50 *l.* at a day certain, to the daughter that the wife had, then the whole surrender should be void. The day elapsed, the 50 *l.* not paid,
and

and the husband died without issue. On a bill to redeem brought by his heir, against a purchaser from the wife, the defendant pleaded that he was a purchaser for a valuable consideration without notice; and it was resolved, that this was not originally designed for a mortgage, but that the party, by settling it thus, had left it in his election, either to perform the condition by paying the money, or to let the settlement stand: he had chosen the latter, and the plea was allowed.

§ 38. A distinction has been likewise made between mortgages, and defeasible or conditional purchases, subject to repurchases within a time limited, where the interest is taken by way of rent charge. For in the latter cases, the stipulations made between the parties must be strictly adhered to, or the estate of the grantee will become absolute.

Cases of
conditional
Purchases.

§ 39. J. S. granted a rent charge in fee, of 48 l. a year to B. upon condition, that if J. S. should at any time give notice to pay in the consideration money, (being 800 l.), by instalments, viz. 100 l. at the end of every six months, and should, pursuant to such notice, pay the same, and interest, *at any time during his lifetime*, then the grant to be void. There was no covenant for J. S. to pay the money, and the rent charge was much less than what the interest came to, (interest being then 8 *per cent.*), B. had conveyed it over, after J. S.'s death, to a purchaser, with collateral security for quiet enjoyment, and the purchaser had afterwards

Floyer v.
Levington,
1 P. Wms.
268.

made a marriage settlement upon it. The question was, whether it was redeemable after 60 years? And it was decreed by Lord *Cowper*, that it was not. His Lordship observed, it was material that, at the time of making the mortgage, interest was at 8 *per cent.*, the rent charge, therefore, was much less than the interest of the money; consequently, the payment of the rent charge could not be taken as the payment of the interest; that several circumstances occurred in this case, which, though each of them singly might not be of force to bar the redemption, yet, joined together, were strong enough to prevail over it; that the *mortgagee seemed to have allowed a consideration* for purchasing the equity of redemption after the death of the mortgagor; 1st, By taking the rent of 48 *l. per annum*; 2dly, By agreeing to have his money by instalments; 3dly, By leaving it only at the election of the mortgagor, whether he would redeem or not; that there could be no reason given why such a contingent right of redemption might not, upon fair and equitable terms, be purchased; that length of time, where so great as in the present case, was a good bar of redemption of a rent charge, as well as of land; and that the mortgagor was not bound to pay the money by any covenant. The reporter observes, that, from the turn of Lord *Cowper*'s argument, length of time seemed to be his principal objection to the redemption: but, in the following case, decided by Lord Chancellor *Hardwicke*, upon an appeal from the Rolls, the doctrine that such limited agreements for redemption, or rather repurchase, were legal, is confirmed.

§ 40. In this case, a mortgage was made of an estate by the plaintiff's grandfather, *Thomas Mellor*, in 1689, to *John* and *James Whitehead*: the *Whiteheads* afterwards, on the 5th of *June* 1689, mortgaged the same estate to *Cartwright* and *Haywood*, and their heirs, for securing 200 *l.*, to which *Thomas Mellor* and his son *John* were parties; and *Cartwright* and *Haywood*, in order to secure themselves the interest, made a lease to the plaintiff's father, and to his assigns, dated the 12th of *June* 1689, for 5000 years, at the rate of 12 *l.* a year for the first three years, and 10 *l.* a year for the remainder of the term; and if, in the space of three years, the 200 *l.* was paid with interest, then the premises were to be reconveyed. Receipts had been given sometimes for interest, and sometimes for a rent charge. The last receipt was in 1730. The 200 *l.* was money lent under one *Sutton's* will in 1687, and directed to be laid out in the purchase of lands in fee, in *Lancashire* or *Cheshire*; the rents to be applied towards clothing twenty-four aged and needy housekeepers. The estate, at the time of the mortgage, was worth 500 *l.* only, but was now valued at 900 *l.* The plaintiff, on the 20th *January* 1738, had given notice that he would pay in the money; but the defendant, a new trustee of the charity, had refused to take it, insisting, that it was an absolute purchase. And it was so decreed by *Fortescue*, Master of the Rolls; which decree was, upon appeal to the Chancellor, confirmed, his Lordship saying, that the bill was properly dismissed at the Rolls, not so much upon general rules, as upon the particular circumstances of the case, and the similitude of it to *Floyer v. Levington*.

Mellor v.
Lees,
2 Atk. 494.

Tasburgh v.
Ecklin et al.
4 Bro. Parl.
Ca. 142.

§ 41. King *James* 1., by his letters patent under the great seal, dated the 17th of *June* 1608, granted divers lands to *John King* and *John Bingley*, and their assigns, for 116 years, to commence from the 18th of *May* then last past, at a certain yearly rent. The residue of this term, by deed, dated the 26th of *May* 1677, became vested in *John Tasburgh*, father of *Henry Tasburgh*, the appellant in the cause. King *Charles* 1., by his letters patent, dated the 25th *March* 1647, granted the same premises to *Sir Maurice Eustace* and his heirs, at a like rent, but without reciting or taking any notice of the term of 116 years. *Sir Maurice*, by his will dated the 20th of *June*, devised the premises *inter alia*, to his nephew *Sir John Eustace* in fee, who, by virtue thereof, or as heir at law of the testator, became entitled to the reversion and inheritance of the premises, expectant on the determination of the term of 116 years. The premises being only of the clear yearly value of 200 *l.*, *Sir John Eustace*, in consideration of 200 *l.* paid him by *John Tasburgh*, did, by lease and release, dated the 30th and 31st of *May* 1681, grant and convey the same to *Charles Tasburgh* and his heirs in trust for *John Tasburgh*; and in the release, there was a proviso to the following effect, *viz.* that if *Sir John Eustace*, his heirs, executors, or administrators, should pay to *Charles Tasburgh*, his executors, administrators, or assigns, at the end of five years, to be accounted from the date of the release, the sum of 200 *l.*, with full interest for the same, at the rate of 10 *l. per centum per annum*, according to the custom of the kingdom of *Ireland*, that then it should be lawful to him and his heirs to re-enter, and the same to re-possess

possess and enjoy as in his former right. But if Sir *John*, his heirs, executors, or administrators, should fail in payment of the money with interest, at the time limited, that then the estate of the said *Charles Tasburgh* should be absolute and indefeasible, as well in equity as in law; and that Sir *John*, his heirs and assigns should, on failure of payment as aforesaid, be for ever debarred from all right and relief in equity, against the tenor of the said release. And Sir *John* did thereby, for himself and his heirs, release unto *Charles Tasburgh*, his heirs and assigns for ever, all his right in equity to redeem the premises in case of failure of payment as aforesaid; there was no covenant in the deed, on the part of the grantor, to repay the 200*l.*, or the interest thereof, as is usual in mortgages. The five years mentioned in the proviso being elapsed, and no part of the 200*l.*, or the interest, having been paid, *John Tasburgh*, (having no remedy at law to compel the payment, the estate being only a reversion expectant upon the determination of a term, of which there were then 43 years unexpired), exhibited a bill in April 1687, in the name of *Charles Tasburgh*, against Sir *John Eustace*, setting forth the nature of the conveyance, and praying payment at a certain day, or that the conditional estate of *Charles Tasburgh* in the premises, (in case it should be adjudged to be a defeasible or redeemable estate), should be made absolute to him and his heirs; and, in that case, that Sir *John Eustace* might be foreclosed of all right or equity of redemption of the premises, and might make farther absolute conveyances and assurances to the said *Charles Tasburgh*, according to the tenor and true meaning of the

the indentures of lease and release. Sir John being served with a subpœna to answer this bill, stood out all process of contempt to a sequestration, and in May 1688, appeared by his fix clerk, and prayed a commission for taking his answer in *England*, which was granted by consent. But it was ordered, that unless the same was returned by the 22d of June following, the cause should be set down to be heard, and the bill taken *pro confesso*. Sir John having neglected to answer at the time limited, farther time was given him: but he still neglecting to answer, a decree was made the 11th December 1688, that he should be foreclosed, unless the principal, interest, and costs, were paid before the 11th December 1689. Afterwards, Sir John Eustace returned to *Ireland*, and lived until the year 1706, when he died without issue; but he never took any one step to impeach these proceedings or decree; nor did he ever attempt to seek a redemption of the premises, but acquiesced under the decree for 18 years. Henry Tasburgh, the appellant, succeeded to his estate on the death of his father, in 1691, and entered thereupon: and not imagining that, after an acquiescence of 34 years under the decree, any person would set up a claim thereto, under Sir John Eustace, he, by indenture, dated the 24th of April 1722, in consideration of a fine of 300 *l.*, demised the same to the appellant George M'Namara for the term of 31 years, at the clear yearly rent of 250 *l.* But the value of lands in *Ireland* rising considerably, a bill was exhibited in the Court of Chancery there, in September 1723, by several persons in right of their wives, nieces and co-heiresses of Sir John Eustace), alleging, that the decree
of

of foreclosure was obtained by surprise, fraud, and imposition, and praying it might be reversed. Afterwards, in *April* 1729, the appellant *Henry* put in a plea and answer to this bill, (which having abated, they claimed a right to revive), insisting on the title as before set forth; and, further, pleading the lease and release executed in 1681 by Sir *John Eustace*, the declaration of trust executed by *Charles Tasburgh*, the decree of foreclosure, and the proceedings had in that cause, and the great length of time and acquiescence under that decree. *George M'Namara* denied notice of the respondent's title, and insisted, that he was a purchaser for a valuable consideration of his said term, without any notice. But it was decreed, that upon the respondent's paying the appellant *Henry* the principal, interest, and costs due to him, he should recover the same; and as to *M'Namara*, an issue was directed to be tried, whether he, at any time, and when, had notice that the coheiresses of Sir *John Eustace* had, or claimed any, and what right to the lands in question, after the lease to *King* and *Bingley* should expire. From this decree, an appeal was brought, when it was ordered and adjudged, that the proceedings, orders, and decrees complained of by the appellant, should be reversed, and the respondent's bill dismissed.

TITLE XV.

MORTGAGE.

CHAP. II.

Of the several Interests of the Mortgagor and Mortgagee.

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| <p>§ 1. <i>The Mortgagor is quasi Tenant at Will.</i></p> <p>4. <i>Cannot commit Waste.</i></p> <p>5. <i>Cannot make a Lease to bind the Mortgagee.</i></p> <p>8. <i>Cannot bar the Mortgagee by Fine.</i></p> <p>9. <i>May vote at Elections.</i></p> <p>10. <i>After Forfeiture, has an Equity of Redemption.</i></p> <p>11. <i>Interest of the Mortgagee.</i></p> <p>12. <i>Entitled to Rent after Notice.</i></p> <p>14. <i>Mortgagee of a Lease not subject to Covenants until Entry.</i></p> <p>16. <i>A Mortgagee in Possession</i></p> | <p><i>must account.</i></p> <p>25. <i>Cannot make a Lease.</i></p> <p>27. <i>Cannot commit Waste.</i></p> <p>30. <i>Where he renews Leases, a Trust for the Mortgagor.</i></p> <p>31. <i>Cannot present to a Living.</i></p> <p>32. <i>Cannot bar the Mortgagor by Fine.</i></p> <p>33. <i>A Mortgage may be assigned, but the Assignee only entitled to what is really due.</i></p> <p>35. <i>A Mortgage is personal Estate.</i></p> <p>41. <i>Mortgagee may vote at Elections.</i></p> |
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Section 1.

The Mortgagor is quasi Tenant at Will.

UPON the execution of the conveyance by which a mortgage is created, the legal freehold and inheritance, or the legal estate for the term of years created by the mortgage, becomes immediately vested in the mortgagee. But as it is customary to insert a clause in all mortgages, that until default is made in payment of the mortgage money and interest, the mortgagor shall continue in possession of the premises mortgaged, the mortgagor becomes in many respects tenant at will to the mortgagee. But it is said, that if the proviso

Bowdely v. Blackman, Cro. Ja. 659.

proviso be, that the mortgagor shall continue in possession for the number of years given for the re-payment of the mortgage money, he will then be tenant for years.

Vide 1 Term Rep. 382.

§ 2. It was formerly doubted, whether an assignment, by a mortgagee alone, did not operate so as to make the mortgagor's continuing in possession, under the clause above mentioned, a disseisin or divesting of the term, and turn it to a right; for if it did, the assignee could not assign it over without making an entry, or obtaining the concurrence of the mortgagor. But it was held by Lord Holt, that the mortgagor's continuing in possession would not operate as a disseisin or a divesting of the term, or turn it to a right. And Eyre Justice said, that the covenant to suffer the mortgagor to continue in possession, governs all the subsequent assignments; because it is that the mortgagor shall hold until default of payment, which creates a tenancy at will upon all the mesne assignments.

Smartle v. Williams, 1 Salk. 345.

Comb. Rep. 249.

§ 3. The doctrine of a mortgagor being tenant at will to the mortgagee, is discussed in some modern cases, and it is shewn that the expression is only applicable by way of comparison. For, although some of the qualities of a tenancy at will subsist between a mortgagor and a mortgagee, it will be quite sufficient to call them so, without having recourse to any other description of them. And it is now established, that a mortgagee may, by ejectment without notice, recover against the mortgagor or his tenant, in which respect the

Doug. R. 279.
1 Term R. 378.

Tit. 9. ch. 1. the estate of a mortgagor is inferior to that of a tenant
 s. 23 at will.

Cannot com-
 mit Waste.

3 Atk. 723.

§ 4. A mortgagor in possession cannot legally com-
 mit waste ; and if he does, the Court of Chancery will
 grant an injunction against him ; because it is not just
 or equitable that a mortgagor should prejudice or di-
 minish the security of the mortgagee.

Cannot make
 a Lease to
 bind the
 Mortgagee.

§ 5. A mortgagor in possession cannot make a lease
 to bind the mortgagee. 1st. Because, being only
 tenant at will, a lease by him would operate as a deter-
 mination of his will. 2dly, Because the mortgagor
 can do no act tending to diminish the security. So
 that where a mortgagor makes a lease, the mortgagee
 may consider the lessee as a trespasser, and is not under
 the necessity of giving him six months notice.

Keech v.
 Hall,
 Dong. 21.

§ 6. An ejectment was brought for a warehouse in
 the city of *London*, by a mortgagee, against a lessee,
 under a lease in writing for seven years, made after
 the date of the mortgage, who had continued in
 possession.

The lease was at rack-rent. The mortgagee had
 no notice of the lease, nor the lessee of the mortgage.

Lord *Mansfield*,—"The question for the court to
 decide is, whether by the agreement understood be-
 tween mortgagors and mortgagees, which is that the
 latter shall receive interest, and the former keep pos-
 session, the mortgagee has given an implied authority
 to

to let from year to year at a rack-rent, or whether he may not treat the defendant as a trespasser, disseisor, and wrong doer? No case has been cited where the question has been agitated, much less decided. Where the lease is not a beneficial one, it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor, and either redeem himself, or get a friend to do it. The idea that the question may be more proper for a court of equity, goes upon a mistake:—it emphatically belongs to a court of law, in opposition to a court of equity; for a lessee at a rack rent is a purchaser for a valuable consideration; and in every case between purchasers for a valuable consideration, a court of equity must follow, not lead, the law. On full consideration, we are all clearly of opinion, that there is no inference of fraud or consent against the mortgagee to prevent him from considering the lessee as a wrong doer. It is rightly admitted, that if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action; but here the question turns upon the agreement between the mortgagor and mortgagee. When the mortgagor is left in possession, the true inference to be drawn is, an agreement that he shall possess the premises at will in the strictest sense; and therefore no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt, on payment of which the mortgagor's title ceases. The mortgagor has no power, express or implied, to let leases, not subject to every circumstance of the mortgage. If, by implication,

tion, the mortgagor had such a power, it must go to a great extent; to leases where a fine is taken on a renewal for lives.—The tenant stands exactly in the situation of the mortgagor. The possession of the mortgagor cannot be considered as holding out a false appearance. It does not induce a belief that there is no mortgage; for it is the nature of the transaction that the mortgagor shall continue in possession. Whoever wants to be secure, when he takes a lease, should enquire after and examine the title deeds. In practice, indeed, (especially in great estates) that is not often done, because the tenant relies on the honour of his landlord; but whenever one of two innocent persons must be a loser, the rule is, *qui prior in tempore potior est in jure*. If one must suffer, it is he who has not used due diligence in looking into the title. We are all clearly of opinion that the plaintiff is entitled to judgment.”

§ 7. It should, however, be observed, that a lease of this kind is good against the mortgagor and his heirs, and also, against all strangers; and will entitle the lessee to redeem the mortgage.

Cannot bar
Mortgagee
by Fine.

§ 8. A mortgagor cannot bar the mortgagee by a fine and nonclaim; of which, the reason will be given in Title 35. Fine.

May vote at
Elections.

§ 9. While the mortgagor continues in possession of the lands mortgaged, he is allowed, by the statute 7 and 8 *William and Mary*, to vote for knights of the shire.

§ 10. After

§ 10. After a mortgage is forfeited, and the mortgagee has entered on the lands, there still remains a right in the mortgagor to redeem his estate; which is called *an equity of redemption*, and will be treated of in the next Chapter.

After Forfeiture, has an Equity of Redemption.

§ 11. With respect to the interest of the mortgagee in the lands mortgaged, as soon as the conveyance is executed, he becomes seised or possessed of the legal estate, and may enter into possession, unless prevented by the express terms of the contract. But, in equity, the lands mortgaged, are considered as a pledge only in his hands, for securing the repayment of the money borrowed: and, as long as the right of redemption exists, he is looked upon as a trustee for the mortgagor; so that none of his charges or incumbrances attach on the estate.

Interest of Mortgagee.

§ 12. Where the interest is not paid, the mortgagee becomes entitled to the possession of the land, and also acquires, after giving notice of the mortgage to the tenant in possession, a right to the rent in arrear, at the time of such notice, as well as to what accrues afterwards.

Entitled to Rent after Notice.

§ 13. One *Harrison*, being seised in fee, demised certain lands in 1772, to *Moss* the plaintiff for 20 years, reserving rent, and afterwards mortgaged the same lands to the defendant *Gallimore* in fee. *Moss* continued in possession from the date of his lease, and paid his rent regularly to the mortgagor, all but 28 *l.*, which was due on or before November 1778, when the

Moss v. Gallimore,
Doug. 279.
1 Term R.
384.

the mortgagor became a bankrupt, being, at the time, indebted to the mortgagee in more than that sum for interest on the mortgage. On the 3d of *January* 1779, the mortgagee gave notice to *Moss* the tenant of the mortgage, and demanded the rent then due, and afterwards entered and distrained for rent. The question was, whether the distress could be justified.

Lord *Mansfield*.—" I think this case, in its consequences, very material. It is the case of lands let for years, and afterwards mortgaged; and considerable doubts, in such cases, have arisen in respect to the mortgagee, when the tenant colludes with the mortgagor; for the lease protecting the possession of such a tenant, he cannot be turned out by the mortgagee. Of late years, the courts have gone so far as to permit the mortgagee to proceed by ejectment, if he has given notice to the tenant that he does not intend to disturb the possession, but only requires the rent to be paid him, and not to the mortgagor. This, however, is entangled with difficulties. The question here is, whether the mortgagee was, or was not, entitled to the rent in arrears. Before the statute of *Queen Anne*, attornment was necessary, on the principle of notice to the tenant; but when it took place, it certainly had relation back to the grant, and, like other relative acts, they were to be taken together. Thus, livery of seisin, though made afterwards, relates to the time of the feoffment. Since the statute, the conveyance is complete without attornment; but there is a provision, that the tenant shall

" not

“ not be prejudiced by any act done by him as hold-
 “ ing under the grantor, till he has had notice of the
 “ deed. Therefore the payment of rent before such
 “ notice is good. With this protection, he is to be
 “ considered, by force of the statute, as having at-
 “ tained at the time of the execution of the grant;
 “ and here, the tenant has suffered no injury. No
 “ rent has been demanded, which was paid before he
 “ knew of the mortgage. He had the rent in que-
 “ stion still in his hands, and was bound to pay it ac-
 “ cording to the legal title. But having notice from
 “ the assignees, and also from the mortgagee, he dares
 “ to prefer the former, or keeps both parties at arms-
 “ length. In the case of executions, it is uniformly
 “ held, that if you act after notice, you do it at your
 “ peril. He did not offer to pay one of the parties on
 “ receiving the indemnity. As between the assignees
 “ and the mortgagee, let us see who is entitled to rent.
 “ The assignees stand exactly in the case of the bank-
 “ rupt. Now, a mortgagor is not properly tenant at
 “ will to the mortgagee, for he is not to pay him rent.
 “ He is only *quodam modo*. Nothing is more apt to
 “ confound than a simile. When the court or counsel
 “ call a mortgagor a tenant at will, it is barely a com-
 “ parison. He is like a tenant at will. The mort-
 “ gagor receives the rent by a tacit agreement with the
 “ mortgagee, but the mortgagee may put an end to
 “ this agreement when he pleases. He has the legal
 “ title to the rent, and the tenant, in the present case,
 “ cannot be damnified, for the mortgagor can never
 “ oblige him to pay over again the rent which has been
 “ levied by distress. I therefore think the distress well

“ justified ; and I consider this remedy as a very proper additional advantage to mortgagees, to prevent collusion between the tenant and the mortgagor.”

Mortgagee
of a Lease
not subject
to Covenants
till Entry.

§ 14. It is a principle of law, that an assignee of a lease is subject to the performance of all the covenants contained in such lease ; so that, where a lease is assigned by way of mortgage, the mortgagee would become liable to the performance of the covenants, unless a distinction were made between an absolute assignment, and one made for the purpose of securing the repayment of a sum of money borrowed.

Upon this ground, it has been established, that if a leasehold estate is assigned by way of mortgage, the lessor cannot sue the mortgagee, as assignee of all the mortgagor's estate, even after the mortgage has been forfeited, unless the mortgagee has entered into possession.

Eaton v.
Jacques,
Doug. 457.

§ 15. *Eaton* the plaintiff demised the premises in question to *Denis* for 21 years, rendering rent. Some time after, *Denis* assigned this lease, and all his estate, right, title, and interest therein, to *Jacques*, subject, nevertheless, to the rents and covenants therein contained, with a proviso for making this assignment void, on payment of a sum of money and interest. The rent being in arrear, *Eaton* the lessor brought an action of debt for the rent, against *Jacques* the mortgagee of the term ; and the question was, whether the plaintiff was entitled to recover.

Lord

Lord Mansfield.—“ In point of fact, this case must
 “ have existed for a century past, in a thousand in-
 “ stances ; in this great town, particularly, building
 “ leases have been, and are perpetually mortgaged ;
 “ and yet no instance has been found, where the
 “ ground landlord has attempted to charge the
 “ mortgagee, not in possession, with the rent or co-
 “ venants.”

“ This is a strong argument against the plaintiff,
 “ especially where the case is so hard, so unjust, and
 “ so unconscionable. Numberless inconveniencies
 “ would arise, if such a demand could be supported.
 “ The mortgagee never asks whether the rent is paid ;
 “ he only looks to his security ; and, when the prin-
 “ cipal and interest are paid, he re-assigns.

“ But, if the plaintiff is right, a mortgagee might
 “ be called upon years after such reassignment, for
 “ arrears, or breaches of covenant, during the assign-
 “ ment. The consequences would be terrible. And
 “ all this arises from a mere slip in the attorney, in
 “ making the conveyance ; for, if he had made it an
 “ underlease, by leaving a reversion of a day in the
 “ mortgagor, the landlord would have had no pre-
 “ text to call upon the mortgagee. Though no
 “ cases have been cited at the bar, which apply to
 “ the present question, we have found two in *Vernon*,
 “ which I will state, that it may not be supposed,
 “ after this judgment, that they were overlooked.
 “ The first is the case of *Sparkes v. Smith*. A bill 2 Vern. 275.
 “ having been filed against the mortgagee of a term

1 Vern. 374.

“ to compel him to discover whether the lease had not
 “ been assigned to him, and to perform the covenants,
 “ the court said, that as the defendant was only a
 “ mortgagee, and never had been in possession, they
 “ would not assist the plaintiff to charge him, or desire
 “ him to perform the covenants. The other case is
 “ that of *Pilkington v. Shaller*, which certainly cannot
 “ be supported; for the court, there, refused to re-
 “ lieve the mortgagee, because it was his own fault to
 “ take an assignment of the whole term, and not an
 “ underlease; but that is a very common ground of
 “ relief in equity. These cases, therefore, leave the
 “ question as it stood upon the argument at the bar;
 “ and there being no solemn well considered decision,
 “ we must resort to principles. In leases, the lessee,
 “ being a party to the original contract, continues
 “ always liable, notwithstanding any assignment; the
 “ assignee is only liable in respect of his possession of
 “ the thing. He bears the burden while he enjoys the
 “ benefit, and no longer; and if the whole is not
 “ passed, if a day only is reserved, he is not liable.
 “ To do justice between men, it is necessary to under-
 “ stand things as they really are, and construe instru-
 “ ments according to the intent of the parties. What
 “ is the effect of this instrument between the parties?
 “ The lessor is a stranger to it. He shall not be in-
 “ jured; but he is not entitled to any benefit under
 “ it. Can we shut our eyes, and say it was an abso-
 “ lute conveyance? It was a mere security; and it
 “ was not, nor ever is meant, that possession should be
 “ taken till default of payment, and till the money has
 “ been demanded. The legal forfeiture has only ac-
 “ crued

“crued six months ; and, if the mortgagee had wanted
 “possession, he could not have entered *viâ facti*. He
 “must have brought an ejectment. This was the un-
 “derstanding of the parties, and is not contrary to
 “any rule of law. It was not an assignment of all the
 “mortgagor’s estate, right, title,” &c.

Webb v.
 Russell,
 3 Term.
 393.

§ 16. Where the mortgagee is put into possession of the lands, or where he enters after forfeiture, he becomes a bailiff or steward to the mortgagor, and is subject to account with him for the rents and profits of the estate. A mortgagee in possession is not, however, obliged to account according to the value of the lands ; that is, he is not bound by any proof that the land is worth so much, unless it can likewise be proved that he made so much of it, or might have done so, had it not been for his own wilful default : as, if he turned out a sufficient tenant who held it at so much rent, or refused to accept a sufficient tenant, who would have given so much for it ; for it is the laches of the mortgagor that he lets the land lapse into the hands of the mortgagee, by the nonpayment of the money. And when the mortgagee enters, he is only a bailiff for what he actually receives ; but is not bound to the trouble and pains of making the most of another man’s property.

Mortgagee
 in Possession
 must ac-
 count.

1 Vern. 476.
 2 Atk. 534.
 Anon.
 1 Vern. 45.

§ 17. If the mortgagor proves that the estate was let at a certain price while in the hands of the mortgagee, that will be deemed the rate at which it was let the whole time, unless the mortgagee shews the contrary.

Sel. Cas. in
 Chan. 63.

3 Atk. 518.

§ 18. A mortgagee in possession will be entitled to such expences as he is put to in preserving the estate, and may add them to the principal of his debt, for which he will be allowed interest.

1 Vern. 270.

§ 19. If a mortgagee enters upon the estate mortgaged, and thereby keeps out other creditors, and yet allows the mortgagor to receive the rents and profits, he will be charged with all the profits which he might have made after entry.

§ 20. If a mortgagee permits the mortgagor to make use of his incumbrance, in keeping out other creditors, he will be subject to account for the profits from the time when the creditors were entitled to their remedy.

Chapman v.
Tanner,
1 Vern. 267.

§ 21. A person made a mortgage of his estate, and afterwards became a bankrupt. The assignees brought an ejectment for recovery of the lands comprised in the mortgage. The mortgagee refused to enter, but suffered the bankrupt to fence against the assignees with this mortgage. The Lord Keeper said, the mortgagee should be charged with the profits from the time when the ejectment was delivered.

§ 22. If a mortgagee in possession assigns over his mortgage, without the assent of the mortgagor, the mortgagee is answerable for the profits; for, if he assigns it to an insolvent person, it is a breach of trust.

§ 23. A mort-

§ 23. A mortgagee will not be allowed any thing for his trouble in receiving the rents of the estate himself. But if he is obliged to employ a bailiff or agent, he shall be allowed what he has paid him. And although there be a private agreement between the mortgagor and mortgagee for an allowance to the mortgagee for his trouble in receiving the rents of the estate, yet the Court of Chancery will not carry it into execution: for they will not suffer him to receive more than his principal and interest. 3 Atk. 518. 2 Atk. 120.

§ 24. It is a rule of the Court of Chancery, in directing an account between a mortgagor and mortgagee, that wherever the gross sum received exceeds the interest, it shall be applied to sink the principal. “ But this (says Lord *Hardwicke*) is often attended “ with great hardships to mortgagees, where, as in “ this case, the sum was large, 4000 l. principal, and “ the mortgagee forced to enter upon the estate, and “ could only satisfy his debt by parcels, and is a bailiff to the mortgagor, without salary, subject to account; and therefore, truly said, the Master, he is “ not obliged, for every trifling small exceed of interest, “ to apply it to sink the principal: nor do I know “ that the court has ever laid it down for an invariable “ rule, that the master must always, in taking such “ accounts, make annual rests.” 2 Atk. 534.

§ 25. A mortgagee in possession cannot make a lease of the lands, so as to bind the mortgagor, without an absolute necessity. For, by that means, the estate Cannot make a Lease.

might be greatly injured, by the mortgagee's granting improper or beneficial leases.

Hungerford
v. Clay,
9 Mod. 1.

§ 26. The plaintiff having mortgaged a house in *London* to *Clay* the defendant, tendered him the principal sum due, and interest, which he refusing, exhibited his bill to have a reconveyance. The defendant answered, that he had made a lease of the house for five years, reserving so much yearly rent, with a covenant that, after the expiration of the five years, the lessee should hold it for four years longer: and that, if the plaintiff, the mortgagor, would grant such lease, the defendant would reconvey.

The Master of the Rolls decreed for the defendant.

On an appeal to Lord *Macclesfield*, it was insisted for the plaintiff, that a mortgagee could not make a lease of a house or lands in mortgage, unless there was an absolute necessity for it, which did not appear in this case.

The Chancellor was of opinion, that the mortgagee, before foreclosure of the equity of redemption, could not make a lease for years of a house in mortgage, so as to bind the mortgagee, unless to avoid an apparent loss, and merely in necessity.

Cannot com-
mit Waste.
Cro. Ja. 172.

§ 27. Although a mortgagee in fee in possession has a right, at law, to commit any kind of waste, because
he

he is considered as the absolute owner of the inheritance, yet he will be restrained in equity; and the court will also decree an account to be taken of trees cut down, and direct the produce to be applied, first, in payment of the interest, and, then, in sinking the principal of the debt. 2 Vern. 392. 5 Atk. 723.

§ 28. If, however, the security is defective, the Court of Chancery will not restrain a just creditor from his legal privileges. But the money arising from the sale of timber must be applied towards payment of the mortgage. Sel. Ca. in Chan. 30.

§ 29. A mortgagee of a copyhold may pull down ruinous houses, and build better ones, to prevent a forfeiture: for the lord has a right to say, that the tenant shall not let the houses fall, and might seize if he did. Hardy v. Reeves, 4 Ves. jun. 480.

§ 30. Where a mortgagee in possession of a lease for lives or years gets it renewed, he will be considered, in equity, as a trustee for the mortgagor, who will be entitled to such new lease, on payment of the mortgage money; for such renewal is supposed to be obtained in consequence of the possession of the original lease. But, in cases of this kind, the mortgagee will be allowed to add the fines paid for renewal to his principal, and to receive interest on them. Where he renews Lease, a Trust for the Mortgagor. Sel. Ca. in Chan. 55. 2 Vern. 84.

§ 31. A mortgagee of a manor to which an advowson is appendant, or a mortgagee of an advowson in gross, Cannot present to a Living. Vide Tit. 21.

gross, cannot prevent to the living in case it becomes vacant.

Cannot bar
Mortgagor
by Fine.
Vide Tit. 35.

§ 32. A fine and nonclaim by a mortgagee in possession, will not bar the mortgagor's estate, or right of redemption.

A Mortgage
may be
assigned but
the Assignee
only entitled
to what is
really due.

Matthews v.
Walwyn,
4 Ves. Jun.
118.

§ 33. A mortgagee, either before or after he enters into possession, may assign over his mortgage to another person; but, in all such cases, the assignee is only entitled to what is really due on the mortgage, and not to what may appear due on the face of the mortgage: and, therefore, it is the universal practice, to make the mortgagor a party to the assignment, for otherwise it may happen, that the mortgagee, having received a part of the money, assigns the mortgage in consideration of the whole sum for which the mortgage was originally made; in which case, the assignee would be defrauded, as he could only oblige the mortgagor to pay him what remained due.

Williams v.
Sorrell, 4 Ves.
Jun. 389.

§ 34. Even after an assignment of a mortgage, payments to the mortgagee without notice must be allowed by the assignee, though the assignment of the mortgage were registered.

A Mortgage
is personal
Estate.

Treat. of Eq.
B. 3. c. 1.
f. 13.

§ 35. Although the mortgagee enters into possession, yet, as long as the right of redemption exists, the mortgage is only considered as personal estate, the debt being the principal, and the land the accessory; and if the mortgagor does not redeem, the personal representatives

representatives of the mortgagee will be entitled to the land.

§ 36. A mortgage was forfeited, and the heir of the mortgagee was in possession, and no want of assets: as the mortgage money was part of the personal estate, the heir was decreed to convey the lands to the administrator of the mortgagee.

Ellis v.
Guavas, 2 Ca.
in Cha. 50.
Burnett v.
Kinafton,
2 Vern. 401.

§ 37. Mr. *Garret* being indebted to his brother, devised to him a mortgage for a larger sum, (for which he had got a decree of foreclosure, but died before the account was taken, or the mortgagor absolutely foreclosed); and Lord Chancellor *King* declared, that the lands in mortgage being devised as real estate, should be considered as such between the devisor and devisee: and, therefore, though the legacy was greater than the debt, it should not go in satisfaction of it. But if assets fell short, it was still to be considered as personal estate, for the payment of debts.

Garret v.
Evers,
Mof. R. 364.

§ 38. It is laid down by Lord *Mansfield* in a modern case, that “ a mortgage is a charge upon land, and
“ whatever would give the money, will carry the
“ estate in the land along with it, to every purpose.
“ The estate in the land is the same thing as the
“ money due upon it. It will be liable to debts; it
“ will go to executors; it will pass by a will, not
“ made and executed with the solemnities required by
“ the statute of frauds; the assignment of the debt,
“ or forgiving it, will draw the land after it, as a
“ consequence: nay, it would do it, though the debt
“ were

Martin v.
Mowlin,
2 Burr. R.
969.

“ were forgiven only by parol ; for the right to the
 “ land would follow, notwithstanding the statute of
 “ frauds.”

§ 39. If, however, it appears to have been the intention of the mortgagee, that it shall go as real estate, the personal representative will not be entitled to it.

*Noys v.
 Mordaunt,
 9 Vern. 581.*

§ 40. A testator having a mortgage in fee, devised it to his two daughters and their heirs. One of the daughters dying without issue, her husband and administrator claimed a moiety of the lands as part of his wife's personal estate, it being a mortgage not foreclosed, nor the equity of redemption released. But the court said, although it was a mortgage, as between the mortgagor and mortgagee, yet it being the testator's intention that it should pass as real estate, it must go to the deceased daughter's heir at law.

*Mortgagee
 may vote at
 Elections.*

§ 41. By the statute 9 *Ann.* c. 5., a mortgagee who has been in possession seven years, may vote for a knight of the shire.

TITLE XV.

MORTGAGE.

CHAP. III.

Of an Equity of Redemption.

- | | |
|--|---|
| <p>§ 1. <i>Nature of.</i>
 3. <i>Similar to a Trust Estate.</i>
 4. <i>Is alienable, devisable, &c.</i>
 6. <i>May be mortgaged.</i>
 7. <i>Subject to Curtesy.</i>
 9. <i>But not to Dower.</i>
 11. <i>Unless the Mortgage be for Years.</i>
 12. <i>Is Affets in Equity.</i>
 16. <i>And sometimes at Law.</i>
 18. <i>Who may redeem.</i>
 19. <i>The Heir.</i>
 20. <i>A subsequent Incumbrancer.</i>
 23. <i>A Jointress, &c.</i>
 25. <i>The Crown.</i>
 26. <i>Whoever redeems must do Equity.</i></p> | <p>41. <i>No precise Time is fixed for Redemption.</i>
 42. <i>But Twenty Years Possession is a Bar.</i>
 48. <i>Exceptions — Where there was a Disability.</i>
 54. <i>Where an Account has been settled.</i>
 56. <i>Where the Mortgage has been acknowledged.</i>
 61. <i>Where no Time is appointed for Payment.</i>
 66. <i>Where the Mortgagor continues in Possession.</i>
 68. <i>Where there is Fraud in the Mortgagee.</i>
 70. <i>Or in the Mortgagor.</i></p> |
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Section I.

WE have seen that when the money borrowed on mortgage is not paid at the time specified in the conveyance, the mortgage becomes forfeited at law, and the estate is absolutely vested in the mortgagee. But still the Court of Chancery allows the mortgagor a reasonable time to redeem, on payment of the principal, interest, and costs; which is called *an equity of redemption*.

Nature of.

Ch. I.

§ 2. An equity of redemption is a mere creature of a court of equity, founded on this principle: that as a mortgage is nothing more than a pledge, for securing

securing the re-payment of a sum of money to the mortgagee, it is but natural justice to consider the ownership of the land as still vested in the mortgagor, subject only to the legal title of the mortgagee, so far as such legal title is necessary to his security. And as the estate in the land cannot be in abeyance, and is not absolutely in the mortgagee, it must necessarily be in the mortgagor.

Similar to a
Trust Estate.

§ 3. An equity of redemption is therefore considered as similar, in most respects, to a trust estate; for the mortgagee is entitled to, or holds the land, only as a pledge for securing the repayment of his money; and, in all other respects, is a trustee for the mortgagor.

Is alienable,
devisable, &c.
Boscarrick
v. Burton,
Infra, ch. 6.

§ 4. It follows, that an equity of redemption may be aliened, intailed, and devised, and is descendible in the same manner as a trust estate.

Philips v.
Hele, 1 Rep.
in Cha. 190.

§ 5. A person having mortgaged his estate, had devised it away to a stranger: it was decreed, that the equity of redemption was thereby transferred to the devisee, and did not descend to the heir at law of the mortgagor.

May be
mortgaged.

§ 6. An equity of redemption may also be mortgaged. But a mortgage of this kind, which is usually called a *second mortgage*, is seldom recommended by conveyancers for two reasons: 1st, because a third mortgagee without notice, may, by paying off the first mortgage, acquire a preference over the second: 2dly, because great difficulties may arise in calling in the money,

Vide infra,
Ch. 5. f.

money, for as a second mortgagee has no legal remedy, he is driven to the tedious and expensive process of a suit in Chancery to recover even his interest. There is, however, one case where an equitable security may be accepted; that is, where a term of years prior to the first mortgage can be procured; for the acquisition of such a term will give the second mortgagee the legal estate, and compel the first mortgagee to become plaintiff in equity.

§ 7. An equity of redemption is subject to curtesy : Subject to Curtesy.
so that where a man marries a woman, who is entitled to an estate that is mortgaged, and has issue by her, he will be allowed in equity to hold it during his life, as tenant by the curtesy.

§ 8. A woman, being seised of certain lands, made a mortgage in fee of them for securing 900*l.* and interest. She afterwards married, and died, without having paid off the mortgage, leaving issue a son. The husband claimed to be entitled to the lands for life, as tenant by the curtesy; but the Master of the Rolls held he was not. On an appeal to Lord *Hardwicke*, his Lordship observed, that this case depended on two considerations: 1st, what kind of interest an equity of redemption was considered to be in a court of equity; 2dly, what was necessary to entitle the husband to be tenant by the curtesy. *Cashborne v. Inglis*, 1 Atk. 603. 2 Ab. Eq. 728.

As to the first, an equity of redemption had always been considered in equity as an estate in the land; it was such an interest as would descend from the ancestor

cestor to the heir; it might be granted, intailed, devised, or mortgaged, and that equitable interest might be barred by a common recovery; which proved that an equity of redemption was not considered as a mere right, but such an estate whereof, in consideration of equity, there might be a feisin, or a devise of it could not be good. The person intitled to the equity of redemption was in this court considered as the owner of the land, the mortgagee only retaining the land as a pledge or deposit; and for this reason it was, that a mortgage in fee was considered as personal estate, notwithstanding the legal estate vested in the heir of the mortgagee, in point of law. The husband of a mortgagee in fee could never be tenant by the curtesy of the mortgaged estate, unless there was a foreclosure, or the mortgage had subsisted for so great a length of time, as the Court of Chancery thinks sufficient to induce them not to grant a redemption. As a mortgage in fee is only a chose in action, if the ownership of the land is not in the mortgagor, it is in nobody. An equity of redemption is no otherwise a right of action than every trust, and, as there can be no benefit had of an equity of redemption, but by subpœna out of Chancery, so is the case of every mere trust in land, which is considered as real estate in Chancery, but cannot be come at without a subpœna. It was true, a mortgagee was not barely a trustee for the mortgagor, but it was sufficient for the present purpose, if he was in part a trustee for the mortgagor; and it was most certain, that, as to the real estate in the land, the mortgagee was only a trustee for the mortgagor, for, until foreclosure, the mortgagee was only owner as a charge
or

or incumbrance, and entitled to hold as a pledge; and as to the inheritance and real estate in the land, the mortgagee is a trustee for the mortgagor until the equity of redemption is foreclosed. Secondly, What is requisite to entitle the husband to be tenant by the curtesy? Four things; *viz.* marriage, issue, death of the wife, and seisin. It was admitted, that the three first did concur; but the objection relied on, was, that there was no actual seisin of the wife during the coverture, which was contended to be as necessary, in respect to an equitable, as a legal estate. The true question upon this point was, whether there was not such a seisin or possession in the wife, of the equitable estate in the land, as, in consideration of equity, was equivalent to an actual seisin of a legal estate at common law? And his Lordship said, that, in the consideration of the Court of Chancery, he was of opinion, there was such a seisin of the wife in the present case, of the equity of redemption, and said he had shewn, that a person entitled to the equity of redemption was owner of the legal estate in the land; and, if so, there must be a seisin of the legal estate: and what other seisin could there be, than what the husband and wife had in the present case? for the wife was all along in possession until her death, and the mortgagee did not come into possession until after her death, nor was there any foreclosure. And though the possession of the wife was but as tenant at will to the mortgagee, yet it was, in equity, a possession of the real owner of the land, subject only to a pecuniary charge on it; and from thence it clearly followed, that there could not be an

Vide Tit. 5.
ch. 1. f. 8.

higher seisin of an equitable estate. That the husband might be tenant by the curtesy of this equitable estate, his Lordship cited *Williams v. Wray*, 2 Vern. 680, *Sweetapple v. Bindon*, id. 536., and observed, that there had been two objections made; 1st, That the husband had it in his power to have had seisin in his wife's life-time, for he might have paid off the mortgage, and therefore it was his own laches that he did not: 2dly, That a woman is not dowable of an equity of redemption. As to laches in the husband, it was compared to his not making an entry at law, but the comparison will not hold, for it was not so easy to pay off the principal and interest due on a mortgage, as to make an entry at law, nor was it to be done so speedily, for a mortgage was, in most cases, allowed six months notice to be paid. And in the case of *Sweetapple v. Bindon*, the husband might have brought his bill in his wife's life-time to compel the laying out the money in the purchase of lands; but though he omitted to do so till after his wife's death, yet that was not objected to him as laches. As to the objection of a wife's not being endowed of an equity of redemption of a mortgage in fee, and that therefore a husband ought not to be tenant by the curtesy of an equity of redemption, this proved too much, for it had been determined, that a wife shall not be endowed of a trust estate, yet that a husband shall be tenant by the curtesy of it. That the argument from dower to curtesy failed in this case. Perhaps it will be hard to find a sufficient reason how it came to be so determined in one case, and not the other, but that it was safe to follow former precedents, and

and what are settled and established; and if such precedents should be departed from, his Lordship held it fit, rather that the wife should be allowed dower of a trust estate, and not that curtesy of a trust estate should be taken away,

Decreed that the husband was entitled to curtesy.

§ 9. A widow is not, however, allowed dower out of an equity of redemption of a mortgage in fee, upon the principle, that an equity of redemption is analogous to a trust estate; and however severe and unjust this doctrine may seem, yet it has been solemnly confirmed in a modern case.

But not to Dower.

Vide Tit. 12. ch. 2. f. 12.

§ 10. *Abraham Dixon* being, in his life-time, and at his death, seised in fee of estates in the county of *Northumberland*, of the yearly value of 3000 *l.* and upwards, died in 1782 without issue, leaving *Ann Dixon*, the plaintiff, his widow. *Abraham Dixon*, by his will, dated 3d *January* in the same year, devised his real estates, &c. to the defendants, *Sir George Saville*, *William Orde*, and *Thomas Adams*, their heirs and assigns, upon trust in his will mentioned, and subject thereto, to his great nephew, *Arthur Onslow*, his heirs and assigns for ever.

Dixon v. Saville, Powell Mort. v. 2. p. 37.

The testator not having in his life-time made any settlement or other provision for his wife, in lieu or bar of dower, she, not having done any act to bar herself thereof, filed her bill against the trustees, stating the above facts, claiming dower out of all the testator's

real estate, and praying to be let into the receipt of one-third part of the rents and profits thereof.

To this bill the trustees and infant put in their answer, setting forth that the testator, being seised of these premises, had borrowed a large sum of money upon mortgage, and for securing the repayment thereof with interest had, previous to his marriage with the plaintiff, conveyed the premises unto the mortgagee in fee, subject to a proviso for redemption on repayment of the money with interest, that the legal estate in the premises being by this mortgage absolutely vested in the mortgagee, previous to and at the time of the intermarriage of the testator with the plaintiff, and not being at any time afterwards reconveyed to him, but remaining vested in the mortgagee at the time of his death, and he being therefore only entitled to the equity of redemption thereof at the time of his intermarriage, and at all times thereafter until the time of his death; the plaintiff was not at any time dowable in or out of the said premises or any part thereof, nor was entitled to claim, either at law or in equity, any dower or thirds therein.

On the hearing, the plaintiff could have proved by witnesses that the testator, her husband, understood and declared that after his death his widow would be entitled to dower out of his real estates; and that he made his will under that idea could have been proved, if relevant, by the person who drew it, Mr. *Dixon* having put the question to him, whether Mrs. *Dixon* would not be entitled to her dower, to which he, being
at

at that time ignorant of the mortgage, answered, that she certainly would; indeed the will itself sufficiently spoke the idea; for *Dixon* thereby bequeathed to the plaintiff, by the name of his dear wife *Anne Dixon*, his coach and harness and a pair of horses, together with as much of his plate as she should think proper, not exceeding the sum of 60*l.*; which things she could have no occasion for, if she had not a jointure to support her.

If the question was lost, Mrs. *Dixon* was left totally destitute of any provision.

The claim of the widow was supported on three grounds :—

1st, The general law.

2dly, The distinction between a mere trust and an equity of redemption.

3dly, The authorities in favour of dower under circumstances not more favourable than those attending this case.

Under the first of these heads, it was observed, that dower was a right of the first attention and most sacred preservation at the common law; it was a right not only founded in our law, but a right consonant to the first principles or laws of morality and equity, as springing from the moral obligation a man was under to make a provision for his wife. And we accordingly found it, in a variety of cases, aided and extended beyond its strict legal limits, by the interposition of our

Tit. 12. ch. 3.

courts of equity, in removing trust terms and other obstructions to it, in certain cases, which would stand in the way of it at common law. This proved it to be a right not merely confined to our common law, but a right recognized, protected, and aided in equity; and which, so far as it was the subject of relief in equity, was an equitable right. This was the predicament in which it stood in the cases of *Dudley and Dudley*, *Wray* and *Williams*, and the other cases, in which it had been decided, that a dowress should have the benefit of a trust term attendant on the inheritance as against the heir. Considering it therefore as an equitable right, it well might be a wonder how it came about that a widow should not be entitled against the heir to dower of an equitable inheritance. Some, indeed, had confined the rule of her not being so to the cases where the trust was created by the husband himself. This had been the opinion of the Master of the Rolls in *Banks and Sutton*; however this opinion had been overruled, and it seemed to be a settled point, that a widow was not dowable of a direct proper trust,

This naturally leads to the second head of argument in favour of the widow; namely, the distinction between a mere trust, that was an use, as it was styled at common law, and an equity of redemption. The former was regarded at common law as quite a distinct interest from the legal estate, to which the right of dower was annexed. It of course did not involve in it that right; if it had, there would have been two opposite rights of dower in the same lands at the same time, as the widow of both the trustee and of the

cestuique

cestuique use would have been entitled to dower. For the widow of the trustee was clearly entitled at common law ; and when the Court of Chancery interposed to prevent the *legal* title of the widow of the trustee, it seemed extraordinary that it did not, in its place, substitute an *equitable* one of the *cestuique* trust. But, however, these sorts of trusts being the creatures of the parties themselves, whatever were the legal incidents or privileges they wanted, might have been supposed to have been voluntarily relinquished and abandoned by the parties creating those trusts. But it was otherwise in regard to an equity of redemption, that was not any interest created or reserved by or between the parties beyond the express time of redemption ; it was a mere creature of a court of equity itself, founded on this principle, that as a mortgage was originally nothing more than a pledge or security to the mortgagee for his money, it was but natural justice between man and man to consider the original ownership of the lands as still residing in the mortgagor, subject to the legal title of the mortgagee so far only as such legal title was requisite to the end of his security ; and, accordingly, the title of the mortgagee was not treated, by equity, as any thing beyond that point. His beneficial interest, though the mortgage was in fee, was considered only as personal estate ; he was not permitted to grant leases, or exercise any other act of ownership, to the prejudice of the mortgagor, to whom he was even accountable for the profits of his estate : his widow was not permitted to claim dower, nor could he, or those claiming under him, avail themselves of several other privileges and incidents attending real property. It

seemed to be the regular consequence of the doctrine adopted by our courts of equity, in regard to mortgages, by considering them strictly and merely in the nature of securities for the mortgage money, and entitling the mortgagee to no other of the incidents or privileges of ownership in the lands than what was requisite for the end of such security; that all such privileges and incidents of ownership of the lands as were not considered as becoming vested in the mortgagee for the purpose of his security, should be held to remain in the mortgagor, or, in other words, that he should, to all purposes not prejudicial to the mortgagee, be considered as the complete owner of the mortgaged lands. And, accordingly, this was found to be the established doctrine, in several instances, when only volunteers were interested; such as revocations under powers, and revocations of devises; because in equity, a mortgage did not make the estate another's, and because a mortgage was not an inheritance, but a personal estate; and there seemed no reason in the world why these general incidents of complete ownership should be saved in favour of a devisee, or other volunteer, and not in favour of a wife, whose claims of dower stood upon the strongest grounds of moral and equitable right, and who was, in many instances, considered as entitled to relief in equity, in regard to an intended provision, when a devisee or other mere volunteer was not. And agreeable to this doctrine was the decision in the case of *Banks and Sutton*, where it was decreed in favour of the claim of dower, out of an equity of redemption of a mortgage in fee; which decision was founded on a variety of authorities and reasons delivered by the Master of the Rolls, all which

Vide Tit. 12.
ch. 2. f. 18.

which were equally forcible in the present case. That the case of *Banks* and *Sutton* was directly in point of the present question; for though the Master of the Rolls would not take upon himself to determine the question, in regard to the dower, out of a *mere trust*, created not by the husband, but by some other person, with no time limited for conveying the legal estate, and avoided this point by shifting his grounds to that of the husband's being entitled, under the express direction of the will under which he claimed, to have the estate conveyed to him at the age of 21, which circumstance, under the application of a common principle of equity, of considering that as done which ought to have been done, of course, in equity, let the widow into the same degree of title as she would have had if the trustees had conveyed the estate to her husband at the time directed; yet, as there was a mortgage in fee prior to the devise, the other point of the right of dower out of such equity of redemption still subsisted, independant of the constructive or assumed conveyance by the trustees at the time directed. And as the principle on which the Master of the Rolls got rid of the first point did not apply to this, he accordingly found himself constrained, instead of changing his ground as before, to enter into a strict examination of it, and meet the objections to dower with authorities, inferences, and general reasoning, and, through them, to come to a professed decision of the point, as he expressly did, when he said, "he did not know or could find any instance where dower of an equity of redemption was controverted and adjudged against the dowress;" and as there were authorities in

Vide Tit. 12.
ch. 2. s. 17.

in cases less favourable, he therefore declared, that the widow of the person entitled to the equity of redemption of the mortgage in question, which was a mortgage in fee, had a right of redemption, and decreed her the arrears of her dower from the death of her husband, she allowing the third of the interest of the mortgage money unsatisfied at that time : that an authority more directly in point than this could not be expected. And though the subsequent case of the Attorney General against *Scott*, (before Lord *Talbot*), in which the widow was denied dower, was generally considered as an authority contrary to and superseding that of *Banks* and *Sutton*, yet such a conclusion seemed too hasty, as the two cases appeared to differ materially ; for in that of the Attorney General and *Scott*, although there was a mortgage, yet the question did not turn upon that, because the legal estate was outstanding in trustees in whom it was vested antecedent to such mortgage, and consequently the decision in that case was on a direct proper trust, and not on a mere equity of redemption. And the difference between a *direct trust* and an equity of redemption, and between the claim of a widow and that of a devisee or mere volunteer, was strongly insisted upon ; and the distinction between this case, and that of a claim of dower against a purchaser fully enforced.

But the Lords Commissioners said that the case of an estate by the curtesy in a trust was the anomalous case, not the rule, that the wife should not have dower ; and that this point was so much settled, that it would be wrong to discuss it much ; and the bill was dismissed,

satisfied, but without costs, the defendants not praying them.

§ 11. A widow is, however, entitled to dower of an equity of redemption of a mortgage for a term of years; because, in that case, the husband is seised of the freehold and inheritance: and where a mortgage of this kind is satisfied, the Court of Chancery gives the dowress relief, by removing the term; but if the mortgage be not satisfied, then the dowress must keep down a third of the interest, or pay off a third of the principal.

Unless the Mortgage be for Years.
2 P. Wms.
716.

§ 12. An equity of redemption of a mortgage in fee is not assets at law; for the legal estate not being in the heir, he may plead *riens per descent*. As to the question whether an equity of redemption was assets in equity, the courts reasoned by analogy from trust estates, which not being assets, they determined that an equity of redemption, being a trust estate, should not be assets. But when it was enacted by the statute of frauds, that trust estates should be assets, the Court of Chancery determined, that an equity of redemption should be assets in equity.

Is assets in Equity.
2 Atk. 294.

§ 13. An equity of redemption of a term for years in gross, is also assets in equity: for the mortgage being forfeited at law, and the whole estate thereby vested in the mortgagee, the equity of redemption is barely an equitable interest.

Creditors of Sir C. Cox,
3 P. Wms.
341.
Hartwell v. Chitters,
Amb. 308.

§ 14. It

Sharpe v.
Scarborough,
4 Ves. jun.
538.

§ 14. It was held, in a modern case, that an equity of redemption is not equitable assets as against judgment creditors, who have a right to redeem.

Plunkett v.
Penfon,
2 Atk. 290.

§ 15. An equity of redemption of a trust estate is equitable assets, because creditors can only attach this kind of property in a court of equity.

And some-
times at Law.

§ 16. Where a person seised in fee makes a mortgage by a demise for years, the equity of redemption is assets at law; because the reversion which attracts the redemption being assets at law, the equity of redemption ought to be so too: and a creditor may have judgment at law, with a *cessat executio*, during the term.

Girling v.
Lee,
1 Vern. 63.

§ 17. Where an equity of redemption is devised to an executor for the payment of debts, it then becomes legal assets; because the devise of the equity of redemption to the executor, shews the intention of the testator, that it should be applied like other assets.

Who may
redeem.

§ 18. An equity of redemption being alienable, it follows, that all those who derive an interest from the mortgagor, by descent or purchase, may redeem the mortgage.

The Heir.

§ 19. Where an equity of redemption is not disposed of by the mortgagor in his life-time, or by his will, his heir becomes entitled to it; and, if the descent be customary, the equity of redemption will go according

according to the custom : so that, in gavelkind lands, it will descend to all the sons, and, in borough *English*, to the youngest.

§ 20. The right of redemption is not confined to the mortgagor and his heirs, but extends to all persons claiming any interest whatever in the premises, as against the mortgagor. Thus, any subsequent incumbrancer may redeem a mortgage ; such as a judgment creditor. But if the mortgage be of a term in gross, the judgment creditor must sue out a writ of execution, before he brings his bill to redeem ; for, until execution, a judgment is not a lien on a term for years.

A subsequent Incumbrancer.

Greswold v. Marham,
2 Cha. Ca.
17c.
2 Atk. 440.

Shirley v. Watts,
3 Atk. 200.
Vide Tit. 14.
f. 44.

§ 21. A creditor by statute has been allowed to redeem a mortgage, even after a decree of foreclosure.

§ 22. A bill was brought by the cognizee of a statute of the mortgagor to redeem a mortgage after a decree of foreclosure. The defendant pleaded the decree of foreclosure, and that the statute was acknowledged after the mortgagee's bill was filed, and that the mortgagee had no notice, and made proper parties at the filing of the bill. Mr. *Vernon* said, that if an incumbrancer lies by, and suffers the mortgagee to obtain a decree of foreclosure, though he is not bound by the decree, because not made a party, yet, if he afterwards brings a bill to redeem, he shall not be at liberty to except to the accounts stated by the master, but shall pay the whole upon his redemption. Lord *Harcourt* said.—This is a recent foreclosure. Let the

Crisp. v. Heath,
7 Vin. Ab.
52.

plaintiff redeem upon payment of what is due, with costs.

A Jointress,
&c.

Howard v.
Harris, Ante,
ch. i. f. 22.

§ 23. Any person entitled to an estate in the lands mortgaged, such as a jointress, or tenant by the curtesy, may redeem a mortgage.

Brend v.
Brend,
1 Vern. 213.

§ 24. When husband and wife make a mortgage of the wife's estate, though the equity of redemption be limited to the husband and his heirs, yet the wife shall have the redemption.

The Crown.

Att. Gen.
v. Crofts,
4 Bro. Parl.
Ca. 136.
Vide Tit. 30.

§ 25. The crown may redeem an estate mortgaged, which is forfeited by the outlawry of the mortgagor for high treason. But it is doubtful whether an equity of redemption escheats to the crown for want of heirs.

Whoever re-
deems must
do equity.

Max. in Eq. i.
Treat of Eq.
b. 3. c. i. f. 9.
St. John v.
Holford,
1 Cha. Ca. 97.

§ 26. It is a rule of the Court of Chancery, that he who will have equity, must himself do equity; and, in consequence of this doctrine, it has been long established, that when a mortgagor requires the redemption of his estate, he must, in his turn, allow full equity to the mortgagee.

Baxter v.
Manning,
1 Vern. 244.

§ 27. Thus, where a person borrows money upon mortgage, and afterwards borrows more money from the same person upon bond, and the mortgage is forfeited, he will not be allowed to redeem, without paying the money due on bond, as well as that due upon the mortgage.

§ 28. This doctrine has been contradicted; and it is now settled that a bond cannot be tacked to a mortgage as against the mortgagor. But it has been always held, that the rule applies to the heir at law of the mortgagor, who cannot redeem a mortgage made by his ancestor, without paying off money due on bond: for, upon the ancestor's death, the bond becomes the heir's own debt.

Challis v. Casborn, Prec. in Cha. 407. 2 Vef. jun. 376.
Shuttleworth v. Laywick, 1 Vern. 245.

§ 29. The same rule has been adopted in mortgages for terms of years; for, if the executor brings a bill to redeem, he must pay both the mortgage money and the bond debt.

Anon. 2 Vern. 177.
1 P. Wms. 275.

§ 30. Since the statute made against fraudulent devisees, the devisee of an equity of redemption cannot redeem without paying off a debt upon bond, as well as the money due upon mortgage. Because that statute puts the devisee in the same situation as the heir.

1 Ab. Eq. 325.

§ 31. If a person first lends money upon bond, and afterwards takes an assignment of a mortgage, he has the same equity against the mortgagor and his heirs, to have both debts paid.

Hallelay v. Kirtland, 2 Rep. in Cha. 361.

§ 32. If part of the money originally secured by a mortgage be paid off, and then a further sum is borrowed from the same parties, upon a defective security, no redemption will be granted, unless both sums are paid.

Reason v. Sacheverel, 1 Vern. 41.

Morgrave v.
Lehook,
2 Vern. 207.
Amb. R. 733.
Ex parte
King, 1 Atk.
300.
Roe v. Soley,
2 Black. R.
726. Vide
Jones v. Smith
2 Vef. jun.
372.

§ 33. It has been long settled, that where a person makes two several mortgages of two several estates, and dies, and one of the mortgages is of an intailed estate, or is deficient in value, the heir of the mortgagor shall not be admitted to redeem one without the other: neither shall the mortgagor himself redeem the one and leave the defective mortgage; but he must take both together.

1 Vef. 87.

§ 34. This privilege is only allowed against the mortgagor and his heir or devisee, and not against a purchaser or assignee of the equity of redemption, who may redeem, without discharging a bond debt due to the mortgagee: because the lands in the hands of the alienee can be charged with nothing but what is an immediate lien thereon, which the bond is not.

Coleman v.
Wynce,
1 P. Wms.
775. Prec.
in Ch. 511.

§ 35. *A.* seised in fee of lands, made a mortgage to *B.* for 100 *l.*, and afterwards borrowed 100 *l.* more of *B.* upon bond, and died. The heir at law conveyed the inheritance and equity of redemption to trustees, in trust for the payment of all the bond and simple-contract debts of his father equally. After which, the trustees brought their bill to redeem against *B.*, who insisted on being paid his debt by bond, as well as that by mortgage. It was decreed, that although the heir must have paid the bond debt before he was allowed to redeem, because it became his debt on the death of the ancestor, yet it could not be said to be due from the assignee of the heir, the bond being no lien upon the land.

Bayly v.
Robson,
Prec. in Ch.
89.

§ 36. A settle-

§ 36. A settlement was made by a father upon the marriage of his son, with a covenant that it should be free from any incumbrance; in consideration of which, the son covenanted to reconvey part of the estate after the father's death, or to pay 300 *l.* to such person as the father should appoint. The father created an incumbrance of 300 *l.* by mortgage, and afterwards appointed 300 *l.* to his daughter, and died.

Troughton v. Troughton,
1 Ves. 86.

The son brought a bill to have the estate disincumbered of that mortgage, and also, to have a bond of the father's to the mortgagee delivered up, and discharged out of the assets of the father.

Lord *Hardwicke*,—The plaintiff has a plain equity to have the estate disincumbered of the mortgage brought on it, in fraud of the marriage settlement.

As to the bond, where the mortgagor of an estate, either before or after the mortgage, contracts another debt with the mortgagee, for which he gives a bond, and dies, and the equity of redemption descends to the heir at law, a court of equity will permit the mortgagee to tack the bond to the mortgage, because otherwise it would cause an unnecessary circuit, and the heir at law is debtor for both. But where the person claiming the equity of redemption is as a purchaser for a valuable consideration, there is no right to tack the bond to the mortgage; because the estate is not liable to the bond debt. Though the plaintiff is entitled to be indemnified, as against the father, for

what he is bound to pay by the father's bond, yet he is entitled only out of the father's assets.

§ 37. If there are several incumbrances on an estate, and a prior incumbrancer claims a debt secured by bond, he will not be allowed to add it to his mortgage; but it will be postponed to all real incumbrances, whether by mortgage, judgment, or statute; for the bond is no charge on the estate, and he has not the same equity against a subsequent incumbrancer, as against an heir at law, who is liable to the bond if he has assets.

Morret v.
Palke,
2 Atk. 52.

§ 38. A creditor, by judgment, in 1698, for 600 l., comes to an account in 1707 with the conusor, and settles the remainder due upon the judgment at 420 l., and then takes a mortgage in fee for that sum, as a collateral security to the judgment. One *Saunders*, an attorney, in 1716, takes an assignment of this mortgage, in which there is a recital, that 90 l., the consideration of the assignment, was then the full worth of the estate; and the assignment, likewise, was made at a time when there was a suit depending between particular creditors upon several other estates of the mortgagor, in conjunction with judgment creditors at large, and the representatives of the mortgagor. *Saunders* was in possession, too, of another mortgage in 1688, upon the same estate as was subject to the judgment in 1698, and the mortgage in 1707.

Lord

Lord Chancellor,— “ *Saunders* shall not be allowed
 “ to tack the two mortgages together, *viz.* that in
 “ 1688, and the other in 1707, so as to defeat inter-
 “ mediate incumbrancers between the years 1688 and
 “ 1698, and yet the mortgage in 1707 shall have re-
 “ lation back to the judgment in 1698, and, by con-
 “ solidating them together, shall entitle *Saunders* to
 “ receive the sum due upon that judgment prior to
 “ creditors after the year 1698: but as to money re-
 “ ported due since the year 1707, *Saunders* is to be
 “ paid only in priority to creditors subsequent to
 “ 1707.

“ The rule of the court, as to prior incumbrancers
 “ taking in a subsequent incumbrance, so as to tack it
 “ to the prior, is, where he is a *bonâ fide* purchaser of Vide Ch. 5:
 “ the *puisne* incumbrance, without notice of interme-
 “ diate ones: but here, the *puisne* incumbrance was
 “ bought in while there was such a *lis pendens* as will
 “ make *Saunders* a purchaser with notice.

“ The words in the recital of the assignment of the
 “ mortgage in 1716, that 90*l.*, the consideration
 “ money, was the full worth of the estate at that time;
 “ naturally imply, that there were other immediate
 “ incumbrances; and, therefore, to give *Saunders* the
 “ benefit of tacking both mortgages, would be con-
 “ trary to his own intentions, for, at the time he took
 “ the assignment of this *puisne* incumbrance, he must
 “ know the estate was worth no more, from the very
 “ words of the recital.

“ If a prior mortgagee takes an assignment of a third
 “ mortgage, as a trustee only for another person, he
 “ shall not be allowed to tack the two mortgages to-
 “ gether, to the prejudice of intervening incumbran-
 “ cers. If this was permitted, a mere stranger pur-
 “ chasing the third mortgage, by declaring he bought
 “ it in trust only for the first mortgagee, might tack
 “ both together, and defeat all the other incumbran-
 “ cers.

“ The reason why a mortgage may be tacked to a
 “ judgment, is this, because the judgment creditor,
 “ by virtue of an *elegit*, may bring an ejectment, and
 “ hold upon the extended value; and, as he has the
 “ legal interest in the estate, the court will not take it
 “ from him: but this holds only where the same per-
 “ son has both judgment and mortgage in the same
 “ right, and not where he has the judgment in his
 “ own right, and the mortgage in another right, as a
 “ trustee only.

“ Where there is a prior mortgagee who has a *puisne*
 “ incumbrance, a second mortgagee shall not redeem
 “ the prior, without redeeming the *puisne* at the same
 “ time; and the reason is, because the legal estate is
 “ in the first mortgagee; and this court will not take
 “ away that benefit from him, provided he had no
 “ notice of the second at the time he bought in the
 “ *puisne* one.

“ Where a prior incumbrancer, by mortgage, judg-
 “ ment, or statute staple, has a bond likewise from

“ the mortgagor, the mortgagor, in his life-time, may
 “ redeem the mortgage, &c. without paying off the
 “ bond debt : otherwise as to the heir at law, because
 “ the moment he redeems the estate, it shall be affets
 “ in his hands ; and, for this reason, the court com-
 “ pels him to discharge the bond as well as the mort-
 “ gage.

“ Where there are several incumbrancers upon an
 “ estate, as in the present case, and the prior incum-
 “ brancer has a bond likewise, he cannot insist upon
 “ being paid both, which would be a prejudice to the
 “ *puisne* incumbrancers : but his bond shall be post-
 “ poned to all other incumbrancers, whether by mort-
 “ gage, judgment, or statute staple ; for he has not
 “ the same equity against a *puisne* incumbrancer as
 “ against an heir at law, who is liable in respect of
 “ affets.

“ An agent, trustee, heir at law, or executor, pur-
 “ chasing a *puisne* incumbrance, as against another in-
 “ cumbrancer, shall be paid no more than what he
 “ gave for this incumbrance ; otherwise as to a prior
 “ creditor, who *bonâ fide* buys in a *puisne* incumbrance,
 “ though he did not give the full value for it : the
 “ rule is laid down generally, indeed, by Lord Chan-
 “ cellor *Jeffreys*, in the case of *Williams v. Springfield*,
 “ as well with regard to creditor and creditor, as to
 “ trustees, heir at law, or executor : but I cannot say
 “ that I remember any decree in this court, subsequent
 “ to this case, where it has been laid down as a general
 “ rule, but has been much more narrowed since, and

“ holds only, as I observed before, with regard to
 “ agent, trustee, heir at law, or executor.”

Heams v.
 Bance,
 3 Atk. 630.

§ 39. The Lord Chancellor, since *Hilary* term then preceding, had ordered this cause to stand over, to search the register's book for the case of *Ridout v. Lord Plymouth*, which had been mentioned at that time as an authority in point; but, being looked into, it did not appear to be at all similar to the present; in which, the question is, whether a mortgagee who lent a further sum upon bond, should be allowed to tack it to his mortgage, in preference to other creditors under a trust for payment of debts created by the will of the mortgagor?

Lord Chancellor.—“ I have considered this case,
 “ and am inclined to think the mortgagee shall not be
 “ allowed to tack the bond to the mortgage, with regard
 “ to the heir of the mortgagor. The reason why he
 “ shall not redeem the mortgage without paying the
 “ bond likewise, is to prevent a circuitry, because the
 “ moment the estate descends upon him, it becomes
 “ assets in his hands, and liable to the bond. A de-
 “ visee, too, of the mortgaged premises for his own
 “ benefit, is subject to the same rule, since the statute
 “ of fraudulent devises made in favour of bond cre-
 “ ditors.

“ But this is a devise in trust for payment of debts,
 “ and the descent is consequently broke; so that, as
 “ I am at present advised, I am of opinion the mort-
 “ gagee can have no priority with regard to his bond,
 “ but

“ but as to that, must come in *pro rata* with the rest
 “ of the creditors under the trust. But, if the coun-
 “ sel for the mortgagee have an inclination to be heard
 “ on this point, it shall stand over.”

The Attorney General of counsel for him said, he thought the point was too strong against the *mortgagee* to be maintained; and the court thereupon made an immediate decree accordingly.

§ 40. Upon further directions, the only question was, whether Mr. *Carforth*, a creditor by mortgage of *Andrew Whelpdale* deceased, and also a bond creditor for 1834 *l.* 3 *s.* should tack his bond debt to his mortgage against other specialty creditors.

Lowthian v.
Hafel,
3 Bro. Rep.
162.

Lord Chancellor.—“ The only reason why the
 “ mortgagee can tack his bond to his mortgage, is to
 “ prevent a circuitry of suits; it is solely matter of ar-
 “ rangement for that purpose; for, in natural justice,
 “ the right has no foundation. The principle explains
 “ the rule; and, therefore, it can go no further: the
 “ creditors having another specific security cannot
 “ give him, in justice, any priority for a lien that is
 “ subsequent. There being no foundation in justice,
 “ the only question is, whether the court is in the
 “ practice of doing it; and it has not done it in any
 “ case, but that of the heir, and merely to prevent
 “ circuitry.”

§ 41. With respect to the time in which a redemption is allowed, it is held that mortgages are not
 L 4 within

No precise
Time is fixed
for Redemp-
tion.

3 P. Wms.
287 n.

within the statutes of limitations; and the courts of equity have not laid down any general rule when the length of possession of the mortgagee shall bar the mortgagor's right of redemption, as they consider that lands are usually mortgaged for much less than their real value; and that when a mortgagee receives his principal, interest, and costs, he cannot complain of an injury.

But 20
Years pos-
session is a
bar.

§ 42. But it being extremely difficult for a mortgagee, who has been long in possession, to make out an account of the profits he has received, the Court of Chancery has frequently determined, by analogy to the statutes of limitations, that where the mortgagor has suffered the mortgagee to continue for 20 years in the quiet and uninterrupted possession of the lands mortgaged, the right of redemption shall be presumed to be deserted.

Clapham v.
Bowyer,
1 Rep. in
Chan. 286.
Pearson v.
Pulley, 1 Cha.
Ca. 102.

§ 43. In 13 *Car. 2.* upon a claim of redemption, it was pleaded, that 20 years had elapsed since the mortgage had been forfeited; and that the land had descended to the heir at law of the mortgagee, who had sold it.—The plea was held good.

White and
Ewer,
2 Vent. 340.

§ 44. In 29 *Car. 2.* upon a rehearing, before Lord Keeper *Bridgman*, assisted by *Vaughan* and *Turner* Justices, concerning the redemption of a mortgage, made upwards of 40 years before, his lordship declared, that he would not relieve a mortgagor after 20 years, as the statute of limitations had adjudged it reasonable to limit the right of entry to that period; and

and it was best for equity to follow the law as near as possible.

§ 45. Although there be a decree to redeem and account, yet if it be not prosecuted within 20 years, no redemption will be allowed.

§ 46. One *St. John* mortgaged certain lands in 1639, to Sir *Richard Holford*, who entered into possession of them. In 1663, a bill was brought by the mortgagor for redemption, and a decree obtained, to redeem and account: but he dying, the suit was revived by his three daughters; and in 1672, another decree was obtained to account. The plaintiff having purchased from the daughters of *St. John* several lands, and among the rest their equity of redemption, brought his bill in 1700 to redeem: but the bill was dismissed.

St. John v. Turner,
2 Vern. 418.

§ 47. The statute of limitations may be pleaded in a case of this kind to a bill for redemption, as was settled by Lord *Hardwicke* after a good deal of discussion.

Aggas v. Pickerell,
3 Atk. 225.

§ 48. The Court of Chancery, in farther imitation of the common law, has allowed of several exceptions to this rule.

Exceptions where there was a Disability.

Thus, it has been determined, that where the neglect to claim a redemption has arisen from infancy, coverture, imprisonment, or absence from the realm, a possession

Vide Tit. 31.

a possession of 20 years shall not operate as a bar to redemption.

Cornel v. Sykes,
1 Rep. in
Ch. 193.

§ 49. *Alice Cornel*, being seised in fee, according to the custom of the manor, of copyhold lands, she and her husband mortgaged the premises, by surrender, to Dr. *Mountford*, for 30 l. The premises being forfeited, by non-payment of the mortgage money, Dr. *Mountford* took possession thereof, and disposed of them to *Joan* his wife for life, the reversion to the defendant. *Ann Cornel* lived 26 years after the mortgage was made, and then died, leaving the plaintiff her son and heir, who brought his bill to redeem. The defendant insisted that the plaintiff ought not to redeem the mortgage, being of such long standing, and the premises having been conveyed away to a stranger. But the court decreed a redemption, on account of the disability of *Alice Cornel* the mortgagor.

Palmer v. Jackson,
5 Bro. Parl.
Ca. 281.

Jenner v. Tracey, cited
3 P. Wms.
287. n.

§ 50. On a demurrer to a bill to redeem a stale mortgage, where the mortgagee appeared by the bill to have been in possession above 20 years, the court held the defendant need not plead the length of time, but might demur; and that no redemption should be allowed in such case, unless there was an excuse by reason of imprisonment, infancy, or coverture, or by having been beyond sea, and not by having absconded, which is an avoiding or retarding of justice. But there did not seem to be any certain time, when the length of possession of the mortgagee should bar the mortgagor's right of redemption; but as 20 years

would bar an entry or ejectment, abstracting from the excuses above mentioned, there was the same reason for allowing it to bar a redemption; and the demurrer was allowed by Lord King.

§ 51. The same rule was agreed in another case by Lord Talbot, who likewise declared it to be his opinion (though the case was afterwards compromised) that whereas the Court of Chancery had not in general thought proper to exceed 20 years, where there was no disability, in imitation of the first clause of the statute of limitations; so, after the disability removed, the time fixed for prosecuting in the proviso, which was 10 years, ought, in like manner, to be observed.

Belch v.
Harvey,
cited 3 P.
Wms. 287 n.

§ 52. Where 20 years have elapsed after the mortgagee's entering into possession, no legal disability in the person entitled to redeem will preserve the right of redemption; nor will a legal disability have any effect where the time began to run against the ancestor.

2 Vern. 419.
1 Ab. Eq.
314.

§ 53. The plaintiff's father had mortgaged the estate in question in 1686. Ten years after, this mortgage was assigned over to the defendant, who, by agreement, was then let into possession, and had continued so ever since.

Knowles v.
Spence,
1 Ab. Eq.
315.

The mortgagor had been several years dead, leaving the plaintiff's father, his eldest son and heir, of full age, who died in 1714, leaving the plaintiff, his son and heir, about 12 years of age, who brought his bill for an account, and to be let into a redemption of the estate,

estate, of which the defendant had been in possession 33 years; so that he greatly overpaid both his principal and interest.

The Lord Chancellor dismissed the bill, and ordered it to be entered down as one of the reasons of such dismissal, that the plaintiff had no remedy, by ejectment at law, to recover the possession, being barred by the statute of limitations; and he thought that a reasonable guide for a court of equity to follow; and though the plaintiff was an infant at his father's death, yet the 20 years had elapsed before, when there was no infancy, and, therefore, would afterwards run on against infants.

Where an
Account has
been settled.

Procter v.
Cowper,
2 Vern. 377.
Anon.
2 Atk. 333.

§ 54. As the difficulty of accounting is the principal reason that courts of equity will not allow a mortgage to be redeemed, after the mortgagee has been 20 years in possession; when that objection is removed, by an account having been settled; within 20 years, the right of redemption will be thereby preserved.

Conway v.
Shrimpton,
5 Bro. Parl.
Ca. 187.

§ 55. A mortgage, after 40 years possession in the mortgagee, was held to be redeemable, upon the foot of a stated account, and an agreement for turning interest into principal; and the decree was affirmed by the House of Lords.

Where the
Mortgage
has been ac-
knowledged.
Orde v.
Smith, Sel.
Ca. in Cha. 9.

§ 56. Any act of the mortgagee, by which he acknowledges the transaction to be a mortgage, within 20 years from the time when a bill is brought to redeem, will preserve the right of redemption. As if the mortgagee

mortgagee devises the money in case the mortgage shall be redeemed, or brings a bill to foreclose, or takes notice in his will, or in any other deliberate act, that he is only a mortgagee.

§ 57. In a modern case, Lord *Thurlow* is reported to have said,—“ I take it that a man taking notice by
“ a will, or any other deliberate act, wherein he recites
“ that he is a mortgagee, either of those circumstances
“ will take the case out of the rule, that a mortgagor
“ shall not redeem after 20 years.”

Perry v. Marlon,
2 Bro. R.
397.

§ 58. A bill was demurred to, because it was for the redemption of a mortgage after the mortgagee had been 41 years in possession. But it being proved that the mortgagee had promised to allow a redemption 14 years before the bill was filed, a redemption was decreed.

White v. Pigeon,
Toth. 135.

§ 59. It follows, from this principle, that where the mortgagee submits to be redeemed, no length of time will be a bar.

§ 60. A bill was brought to redeem, where the mortgagee had been in possession for 25 years. The defendant, as it was a family affair, submitted to be redeemed, notwithstanding the length of time.

Procter v. Oates,
2 Atk. 140.

Lord *Hardwicke* said, he saw no colour for redemption, but on the defendant's submission, he decreed an account of what was due, and directed the plaintiff to pay the same in six months after the master's report ;
and

and thereupon the defendants were to convey; but in default, the bill was to be dismissed, without costs.

Where no
Time is ap-
pointed for
Payment.

§ 61. Where no particular period is appointed for payment of the mortgage money, a redemption will be decreed at any time: for it is the duty of courts, both of law and equity, to effectuate the agreement of the parties.

Ord v.
Henning,
1 Vern. 418.

§ 62. On a bill to redeem a mortgage, the defendant demurred, because it appeared that the mortgage was 60 years old: but the demurrer was over-ruled, it appearing to have been agreed, that the mortgagee should enter and hold until he was satisfied, which was in the nature of a *Welch* mortgage; and, in such a case, length of time was no objection.

Howell v.
Price, Prec.
in Cha. 423.
1 P. Wms.
291.

§ 63. One *Davids* made a mortgage of lands in *Wales*, by lease and release, to one *Reynolds* and his heirs, in consideration of 300 *l.*; and the proviso was, that if *Davids*, his heirs, or assigns should, on *Michaelmas* 1702, or any *Michaelmas* day following, pay to *Reynolds*, his heirs or assigns, the sum of 300 *l.* and all arrears of rent or interest which should be then due, the conveyance was to cease. It was decreed, that this was in the nature of a conditional purchase, subject to be defeated, on payment by the mortgagor or his heirs of the sums stipulated, on any *Michaelmas* day, at the election of the mortgagor or his heirs; so that there was an everlasting subsisting right of redemption, descendible to the heirs of the mortgagor, which could
not

not be forfeited at law like other mortgages ; and, therefore, there could be no equity of redemption, or any occasion for the assistance of a court of equity. But the plaintiffs might even at law defeat the conveyance, by performing the terms and conditions of it, which were not limited to any particular time, but might be performed on any *Michaelmas* day to the end of the world.

§ 64. One *Palmer*, by lease and release, and fine, in 1699, conveyed two houses to *William Hambly* and his heirs, until he should have received by the rents and profits thereof 50 *l.*, then to the use of *James Plumer* for life, &c.

Yates v.
Hambly,
2 Atk. 360.

The mortgagee entered, and continued in possession upwards of 40 years ; and, upon a question, whether those two houses were then redeemable, Lord *Hardwicke* held they were, and that no bar arose from the length of time. His lordship said, there was no doubt, if this mortgage had been made in the common form, and subject to a forfeiture upon non-payment, the length of time would have been a bar, the courts of law and equity squaring their rules by the statute of limitations. But this was a conveyance of the inheritance for securing the sum of 50 *l.* advanced by *Hambly*, in trust that he should continue in possession till, by perception of the rents and profits, he should be satisfied his principal and interest. Now, there never could be a forfeiture under this deed, for the mortgagee was only in the nature of a tenant by *elegit*, and, as soon as his principal and interest was satisfied, by being paid off,
or

or by perception of the rents and profits, the estate ceased in *Hambly*; and *Plumer*, or his representatives, might have maintained an ejectment: nor would any bar have arisen from length of time, unless the statute of limitations had run by the mortgagee's continuing in possession 20 years after the money had been paid off. His Lordship said, he did not see this case at all differed from a *Welch* mortgage, though he did not say but there were circumstances which might create a bar, even in that case. But in common *Welch* mortgages, on tendering principal and interest, they may come into the Court of Chancery for redemption at any time. The first objection was, that it was liable to all the mischiefs in common cases, and was a breach of the rule laid down in Chancery by way of analogy to the statute of limitations. But to this, the answer was, that there was nothing for the statute of limitations to operate upon; for here was no forfeiture. Indeed, after an account was taken, if it should appear that the mortgage was satisfied by perception of the rents and profits twenty years ago, and that the mortgagee had continued in possession ever since, the statute of limitations would run. The second objection was, that it was unreasonable the mortgagee should be a perpetual bailiff to the mortgagor. But that would not hold here, for the mortgagee takes the estate subject to a perpetual account, and the court ought not to relieve him from his own contract and agreement.

His lordship was therefore of opinion, that the plaintiff was entitled to redeem, upon the common terms of paying principal, interest, and costs, and to have

Have an account of what had been received, and what remained due; and was not obliged to bring an ejectment for the possession, but should have a decree for it, after the mortgage was reported to be satisfied.

§ 65. The case of *Hartpole v. Walsh*, in the House of Lords, 1740, 5 *Brown's Parl. Ca.* 267, does not contradict this doctrine. Hartpole v. Walsh.

In that case, *Robert Hartpole*, in consideration of 600 *l.*, conveyed certain lands, by feoffment, to *Oliver Walsh* in fee, subject to redemption on payment of the money at any last day of *July* or *December*.

By a subsequent deed, *Hartpole*, in consideration of 2,300 *l.*, conveyed the premises comprised in the former deed, and also other premises, to *Walsh*, and covenanted for himself and his heirs, that whenever *Walsh*, his heirs or assigns, should give him 18 month's notice in writing, requiring payment of the said 2,300 *l.*, that then *Hartpole*, his heirs or assigns, should pay the said 2,300 *l.* within 18 months after such request.

After a period of 100 years had elapsed, the heir of the mortgagor filed a bill for redemption, which was dismissed, and the decree of dismissal affirmed in the House of Lords, upon the ground (I presume) stated in the respondent's printed reasons, that the second mortgage deed, comprising all the mortgaged premises, put it in the power of the mortgagee, or his representatives, to ascertain and limit the time of redemption, by demanding the mortgage money. And such de-

mand was admitted to have been made by the son of the mortgagee. Therefore, from that time, the mortgage, whatever it was originally, became of such a nature as made the equity of redemption liable to a foreclosure, either by a decree, or great length of time.

Where the
Mortgagor
continues in
Possession.

§ 66. Where the mortgagor continues in possession, no length of time will bar the equity of redemption. And even a possession of part of the mortgaged premises will preserve the right to redeem.

Rakestraw
Brewer, Sel.
Ca. in Cha.
55.

§ 67. A person in 1687, mortgaged a set of chambers in *Gray's Inn*, but continued in possession until 1700; at which time, an order of the Bench was made to deliver possession to the mortgagee, who entered into part, but as to the remainder, the mortgagor continued in possession until 1708, leaving the plaintiff an infant. A bill was brought to redeem in 1726; and it was so decreed at the Rolls, and affirmed by Lord *King*, who said nothing was more clear, than that, if the mortgagor was in possession of any part, he should be admitted to redeem the whole as being in possession thereof, and part he could not separately from the whole, therefore, he should redeem the whole.

Where there
is Fraud in
the Mort-
gagee.

§ 68. Where any species of fraud has been practised by a mortgagee, at the time when the mortgage was made, a court of equity will interfere, and give relief, notwithstanding a possession of 20 years.

Orde v.
Smith, Sel.
Ca. in Cha. 9.

§ 69. *A.*, for a small sum of money, mortgaged lands to *B.*, and to deceive the mortgagor, it was expressed

pressed that the redemption should be made with *A*'s own money, and in his life-time. *A*'s necessities drove him abroad, where he died. *B.* afterwards devised the money, if the mortgage should be redeemed. On a bill exhibited to redeem, length of time was objected, 41 years having elapsed. But the court decreed a redemption, saying, there was fraud in the original agreement, for the words, "to be paid with his own money," were thrown in to make *A.* imagine it could not be done otherwise.

Forrest. R.
63.

§ 70. On the other side, if the mortgagor be guilty of fraud, he will thereby lose his equity of redemption; for by the statute 4 and 5 *William and Mary*, c. 16., it is enacted, that if any person shall borrow money, &c. or become indebted for any other valuable consideration, and for the payment thereof shall voluntarily give a judgment, statute, or recognizance, and shall afterwards borrow any other sum of money, or for any other valuable consideration become indebted to such other, and for securing the repayment and discharge thereof, shall mortgage lands to the second lender, or to any other person in trust for him, and shall not give notice to the mortgagee of such judgment, &c. in writing, before the execution of the said mortgage or mortgages, such mortgagor shall have no benefit in the equity of redemption of the lands mortgaged, unless such mortgagor or his heirs, upon notice given by the mortgagee in writing, under his hand and seal, attested by two witnesses, of such former judgment, &c. shall within six months pay off and discharge the same, and cause the same to be vacated and discharged. And if

Or in the
Mortgagor.

any person who shall once mortgage lands for a valuable consideration, shall again mortgage the same lands, or any part thereof, to any person, the former mortgage being in force, and shall not discover in writing to the second mortgagee, the first mortgage, such mortgagor shall have no relief or equity of redemption against the second mortgagee; provided that this act shall not extend to bar any widow of any mortgagor of her dower, who did not legally join with such husband in such mortgage, or otherwise lawfully exclude herself.

Stafford v.
Selby,
2 Vern. 589.

§ 71. It has been determined on the construction of this statute, 1st, That if a mortgage becomes irredeemable by this statute, it will remain so, in the hands of an assignee, though assigned in consideration of the principal, interest, and costs due thereon: 2d, If a subsequent mortgagee redeem such a mortgage, he shall hold the estate irredeemable: 3d, If there are more lands in the second mortgage than in the first, that seems to be a case omitted out of the statute. But the adding an acre or two shall not exempt it, for that may be a contrivance to evade the statute.

TITLE XV.

MORTGAGE.

CHAP. IV.

Of the Payment of the Mortgage Money and Interest.

- | | |
|--|---|
| <p>§ 1. <i>The Personal Estate first liable.</i></p> <p>3. <i>Even in favor of a Devisee.</i></p> <p>6. <i>A Disposition of the Personal Estate will not alter this Rule.</i></p> <p>7. <i>Nor a Charge on the Real.</i></p> <p>12. <i>Lands devised for Payment of Debts applied in discharge of Mortgages.</i></p> <p>17. <i>A Person may exempt his Personal Estate.</i></p> <p>22. <i>A specific Gift of a Chattel will exempt it.</i></p> <p>24. <i>Exceptions:—Where the Charge was originally on Land.</i></p> <p>27. <i>Though there be a Covenant for Payment.</i></p> <p>29. <i>Where the Debt was contracted by another.</i></p> <p>31. <i>Although there be a Covenant.</i></p> <p>33. <i>Or a Charge on the Real and Personal Estate.</i></p> | <p>§ 35. <i>Where only an Equity of Redemption is purchased.</i></p> <p>38. <i>Unless the Purchaser makes it his own.</i></p> <p>40. <i>Mortgages by Husband and Wife.</i></p> <p>42. <i>Proportions between Tenant for Life and Remainder Man.</i></p> <p>48. <i>Of Interest.</i></p> <p>51. <i>Agreement to lower Interest.</i></p> <p>53. <i>Interest upon Interest not generally allowed.</i></p> <p>55. <i>Exceptions:—Where a Mortgage is assigned.</i></p> <p>56. <i>Where there is a stated Account.</i></p> <p>57. <i>Where an Account is settled by a Master.</i></p> <p>58. <i>Where the Time is enlarged.</i></p> <p>62. <i>Who are bound to pay Interest.</i></p> <p>68. <i>Mortgage Money is payable to the Executor.</i></p> |
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Section 1.

IT is a rule in equity, where a person dies leaving a variety of funds, one of which must be charged with a debt, that the fund which received the benefit by the contracting of the debt should make satisfaction.

The Personal Estate first liable.

Cope v. Cope,
2 Salk. 449.

In consequence of this maxim, it has been long settled, that if a person borrows money on mortgage, and dies leaving a real and personal estate, without specifically charging either of them with the payment thereof, his personal estate shall be first applied towards the payment of the mortgage; because the personal estate was increased by the money borrowed: and, therefore, it is a general rule, that the executor of a mortgagor is compellable to redeem a mortgage for the benefit of the heir, even though there should be no covenant for the payment of the mortgage money.

Ante, ch. 3.
1 P. Wms.
292.

§. 2. In the case of *Howell v. Price*, it was contended, that the personal estate of the mortgagor was not subject to the payment of the mortgage; because it was a conditional sale between the mortgagor and mortgagee.—That the mortgagee should have the land until the mortgagor or his heirs should pay the money.—That it was in the election of the mortgagor whether he would pay it or not, nor would any action of debt lie for it. The court, however, decreed, that the personal estate should be applied in payment of the mortgage.

Even in
Favour of a
Devisee.

Pockley v.
Pockley,
1 Vern. 36.

§ 3. The personal estate is liable to the payment of a mortgage, in favour of a devisee or *hæres factus*, as well as in favour of a *hæres natus*, although there be no bond or covenant for payment of the money.

King v. King,
3 P. Wms.
359.

§ 4. *Thomas King*, having freehold and copyhold lands, mortgaged the copyhold for 550^l. He afterwards devised this copyhold to his nephew and his heirs;

heirs; and after all his debts paid, he devised the rest of his estate real and personal to his son and his heirs, and appointed him executor. It was determined by Lord Chancellor *Talbot*, that the personal estate of the mortgagor was liable to the payment of this mortgage, though there was no covenant or bond for the payment of it.

§ 5. It was formerly held, that there was a diversity between an *hæres factus* and a devisee of particular lands. But it was determined by Lord *Nottingham*, that a devisee of particular lands should have the benefit of redemption by the personal estate, as fully as the *hæres factus*.

Popley v. Popley,
2 Ch. Ca. 84.
1 Atk. 436.

§ 6. Although a person should make a disposition of his personal estate among his relations, yet it will be applied in payment of a mortgage. For the Court will suppose the intention of the testator to have been, that only the residue of his personal estate, after payment of debts, should go to his relations, unless a contrary intention evidently appears.

A Disposition of the Personal Estate will not alter this Rule.
Noke v. Darby,
1 Bro. Parl. Ca. 506.
Infra.

§ 7. Where a testator charges his lands with the payment of his debts, this will not exonerate his personal estate: for such a charge can only be intended for the purpose of creating an additional fund, in case the personal estate should not be sufficient.

Nor a Charge on the Real Estate.
9 Mod. 187.

§ 8. Lord *Hardwicke* has said, “ I know of no authority where the words, I make my real estate liable to pay my debts, will exempt the personal
M 4 “ estate,

Bridgman v. Dove,
3 Atk. 201.

“ estate, without any special exemption of personal
 “ estate : nor has the court ever said, that personal
 “ estate shall be applied only to pay legacies, and not
 “ the debts. Nor will making a particular estate in
 “ land, liable to pay debts, exonerate the personal
 “ estate, because it is the natural fund for payment
 “ of debts. Suppose a man devises a real estate, liable
 “ to the payment of debts, and, subject to those debts,
 “ gives it over to another, or what remains after pay-
 “ ment of debts, which is all one ; if there are not
 “ express words to exempt the personal estate, it shall
 “ be first applied.”

§ 9. Where a term of years is created for the purpose of raising a fund to pay debts and legacies, yet this will not exempt the personal estate.

Cook v.
 Gwavas,
 cited 9 Mod.
 187.
 Lancaster v.
 Mayer,
 1 Bro. R. 454.

§ 10. A person devised lands to trustees for 500 years, upon trust for himself for life, and after his death, upon trust out of the rents and profits to pay his debts, legacies, &c. It was decreed that the personal estate should be applied in exoneration of the real.

Lovel v.
 Lancaster,
 2 Vern. 183.

§ 11. It is the same where a provision is made by way of trust of the inheritance of lands to pay debts, the personal estate will still be liable : and, therefore, where lands were devised to a person for payment of debts, the personal estate was directed to be first applied for that purpose.

§ 12. Where

§ 12. Where the personal estate is deficient, the produce of lands devised for payment of debts will be applied towards satisfying the money due on mortgage.

Lands devised for Payment of Debts applied in discharge of Mortgages.

§ 13. A testator devised his lands at *H.* to *Richard May* in tail, remainder over, those lands being then in mortgage for 1,300 *l.*; and devised other lands to *Thomas May*, subject, however, to the payment of his debts, in case his personal estate, and other estates devised for that purpose, should not prove sufficient to satisfy all his debts.

Bartholomey v. May,
1 Atk. 487.

Lord *Hardwicke* decreed, that the 1,300 *l.* must be paid as a debt of the testator out of the personal estate, or if that should prove deficient, then out of the real estate so devised,

§ 14. A testator began his will by directing, that his executor should pay and discharge all his just debts, and that he should raise sufficient to pay the same. He then devised his manor at *Ggdalmin*, to *Jane Styles*, and her heirs, at the age of 21, or marriage, subject nevertheless to the incumbrances that were or should be upon it at the time of his decease; and in the mean time, and until she should arrive at her said age, or marriage, the rents, issues, and profits to be paid by his executor into the hands of her father or mother. He then devised to his brother, *Leonard Child* and his heirs, the reversion of the manor of *W.* subject nevertheless to the payment of such of his debts as should remain unpaid. And all the rest of his real and personal estate, not therein-before specifically disposed of, he

Serle v. St. Eloy,
2 P. Wms.,
386. note.

he devised to *John St. Eloy* his heirs and assigns, in trust to sell the same, and thereout to pay his debts and general legacies; and in case there should be any deficiency, and that any of his debts and legacies should remain unpaid, then he charged the same on the reversion and inheritance of the manor of *W.* and thereby directed the said *Leonard Child* and his heirs to pay off the same.

It was said, that the lands in *Godalmin*, which were mortgaged for 500*l.* to one *Hunt*, being devised, subject to the incumbrances thereon, the devisee must take them *cum onere*, and be contented to pay off the mortgage.

Master of the Rolls, *contra*.—The devise of the estate, subject to the incumbrance, is no more than what is implied, for the testator could not do it otherwise; but when the testator devises other lands to pay his debts, this must be intended all his debts, and consequently the debt by mortgage of *Godalmin* is part of those debts which are to be paid off out of the money arising by sale of the trust estate; and this is the stronger by the testator's having appointed the rents and profits during the infancy of his god-daughter to be paid to the infant's father, for the sole use of the infant, which is as much as to say, that they shall not go or be applied in discharge of the mortgage. And although the infant, by her own bill, had submitted to pay off the mortgage, yet his Honor said, he must take care of the infant, and not suffer her to be caught by any mistake of her agent; wherefore the infant was directed to amend her bill.

The

The bill having been amended, and the cause coming on to be heard before the Master of the Rolls, his Honor declared, that all the debts and general legacies of the testator were by his will to be paid out of his personal estate, and the real estates devised to the defendants, *St. Eloy and Child*; and that the mortgage of the defendant *Hunt* on the estate devised to the plaintiff, was to be taken as one of those debts; and this decree was afterwards affirmed, on appeal to Lord *King*.

§ 15. A person being seised in fee, and having borrowed a sum of money, gave a bond for it, and also a mortgage. Soon after, he made his will, and devised the estate which he had mortgaged, together with an estate which he held for three lives, to his wife, and made her his sole executrix.

Galton v. Hancock,
2 Atk. 424.

The testator afterwards purchased the reversion in fee of the leasehold estate, and died without republishing his will.

The question was, whether the estate, of which the testator had purchased the reversion in fee, (so that the devise of it was revoked), should be applied in the hands of the heir at law towards paying off the mortgage on the other estate.

Lord *Hardwicke*, at first, thought the devisee was not entitled to such exoneration, but, after taking a year's time to consider of it, he changed his opinion, and decreed, that the lands which descended to the heir at law, should be applied in payment of this mortgage.

The

The case of the heir at law was not so hard as it at first appeared; for it was not the intention of the testator, that the heir should take any part of the estate; and it was a mere accident that threw a part upon him, viz. the ignorance of the testator that it was necessary, after purchasing the fee-simple of the leasehold estate, to republish his will.

Tweedale v.
Coventry,
1 Bro. R.
240.

§ 16. Sir *Robert Worsley* being seised in fee of several estates, subject to mortgages which he had made, and being also seised in fee of estates in the *Isle of Wight*, made his will, reciting himself to be seised of the estates, subject to incumbrances, and devised the mortgaged estates in strict settlement, and devised the estates in the *Isle of Wight* to trustees for 21 years, in trust to pay several annuities, and after payment thereof, to pay all his bond and book debts, in case his personal estate should not be sufficient to pay the same, and also all his legacies and annuities; and subject thereto and such other payments, as they should make to any other person by virtue or in pursuance of any deed by him alone, or, together with his son, executed, he directed the trustees to account for all the remainder of the rents and profits of the premises so devised to them for the said term, to his cousins *James and Robert Worsley*.

It was decreed by Lord *Thurlow*, that the rents and profits of the trust term should be applied in discharge of the mortgages. His Lordship said, he made his decree with great reluctance, from finding himself obliged to charge the trust term of 21 years with the
payment

payment of the incumbrances. Had the question stood upon the words, bond and book debts only, it might have admitted of some doubt ; but the misfortune was, that, by the subsequent clause, Sir *Robert* had directed his trustees to pay all his debts, annuities, legacies, &c. and a still greater misfortune was, that he had made his executors, executors in trust, and had made the term a joint fund with his personal estate.

§ 17. It is, however, in the power of a testator to exempt his personal estate from the payment of money due on mortgage, by substituting his real for his personal estate.

A Person may exempt his personal Estate.

§ 18. *J. S.* devised all his manors to trustees, and their heirs, immediately out of the rents and profits, or by sale or mortgage of the premises, or any part thereof, to raise and levy money for payment and satisfaction of all his just debts ; and if there should be a surplus of lands or money, that to be his sisters jointly, and their heirs ; and gave all his personal estate to his wife, whom he appointed executrix. The Lord Chancellor took notice, that the debts were more than the personal estate amounted to, and, therefore, the testator must have meant that she should have it exempt from debts, or he meant nothing ; and there was, in this case, no room to make a different construction.

Bamfield v. Wyndham,
Prec. in Ch.
101.

§ 19. Sir *William Leman*, possessed of a real and personal estate, the real estate incumbered by several mortgages of his ancestors, made his will. in which he says ; “ I desire all my debts may be discharged by my
“ executors,

Leman v. Newnham,
1 Ves. 51.

“ executors, I mean those only of my own contract-
 “ ing, not those heavier debts charged by my family.”
 He then gave several legacies, and his personal estate
 to his mother, whom he made executrix, desiring her
 to pay all his just debts exactly.

One of the questions in this case, was, whether the
 personal estate was exempted from payment of the
 mortgages, which were created by the testator's ances-
 tor; and it was decreed by Sir *William Fortescue* M. R.,
 that the words of the will were sufficient to exempt the
 personal estate.

Webb v.
 Jones,
 2 Bro. Rep.
 60.

§ 20. A testator devised his real estate to be sold,
 and the money to arise by the sale to be applied to pay
 mortgages and other debts, the residue to be added to
 his personal estate.

It was contended, that these words were not suffi-
 cient to exonerate the personal estate; that in order to
 be so, there must be a destination, as to the estate to
 be sold, for the mere purpose of the payment of debts.
 Here was only a direction *in transitu*, and the words
 did not necessarily imply that the personalty was to be
 exonerated. The trustees were not, under this devise,
 bound to sell the estate immediately: yet the debts
 must be immediately paid: that must be out of the
 personal estate.

Sir *Lloyd Kenyon* M. R.—I have no doubt about this
 case: the general rules are very clear, that the per-
 sonal estate is the fund first liable; and that the
 testator

testator cannot exonerate it without substituting another fund. But there is no magic in words; no peculiar form of expression is necessary in order to exonerate the personal estate. If the intention of the testator be evident to exonerate the personalty, it must be exonerated. Here the intention is beyond all doubt. The testator has directed the residue to be added to the personal estate, but according to the construction contended for, that would be gone.

§ 21. In a modern case, Lord *Thurlow* laid down the following rules respecting this doctrine.—1st, “ That
 “ the personal estate is liable in the first instance to
 “ payment of the debts. But, in exception to this, it is
 “ agreed that the testator may, if he pleases, give his
 “ personal estate as against his heir, or any other re-
 “ presentative, clear of the payment of his debts; and
 “ then it becomes a question, what is the mode of ex-
 “ pression to give the personal estate exempt from such
 “ payment, when the rule of law is that such estate is
 “ first liable. Perhaps it might have been not unwise
 “ to have adopted the rule laid down in *Fereges v.*
 “ *Robinson*, that the testator must use express words
 “ for that purpose; but it is impossible to abide by the
 “ opinion given in that case, consistently with the rules
 “ in other cases. The second rule is, that where there
 “ is a declaration plain, that shall stand in lieu of ex-
 “ press words: This rule has been laid down so long,
 “ and acted upon so constantly, that if other Judges
 “ were to put the constructions of wills upon other
 “ grounds, how wise soever it might have been origin-
 “ ally to have done so, it would be very unwise to
 “ make

Ancafter v.
 Mayer,
 1 Bro. Rep.
 462.

“ make the administration of justice take a course con-
 “ trary to former rules. Therefore if there be a de-
 “ claration plain, or manifestation clear, so that it is
 “ apparent upon the face of the will that there is such
 “ a plain intention, the rule then is, not to disap-
 “ point, but to carry such intent into execution. But
 “ should not such intention manifestly appear, there is
 “ not a single case which does not take it for granted,
 “ that the personal estate is by law the first fund for
 “ the payment of debts.”

A specific
 Gift of a
 Chattel will
 exonerate it.

§ 22. A specific disposition of a chattel will exonerate it from being applied in payment of money due on mortgage.

*Oncal v.
 Mead, 1 P.
 Wms. 693.*

§ 23. A person being seised of a real estate in fee which he had mortgaged for 500 l. and possessed of a leasehold, devised the former to his eldest son in fee, and gave the latter to his wife, and died leaving debts which would exhaust all his personal estate, except the leasehold given to his wife. The question was, whether, there being as usual a covenant to pay the mortgage money, the leasehold premises devised to the wife should be liable to discharge the mortgage.

The Master of the Rolls, after taking time to consider of it, and being attended with precedents, decreed, that as the testator had charged the real estate by this mortgage, and, on the other hand, specifically bequeathed the leasehold to his wife, the heir should not disappoint her legacy, by laying the mortgage debt upon it, as he might have done, had it not been

specifically

specifically devised; and although the mortgaged premises were also specifically given to the heir, yet he to whom they were thus devised, must take them *cum onere*, as probably they were intended.

§ 24. The rule, that the personal estate shall be first applied in payment of mortgages, is founded on the principle, that the debt is originally a personal one, and the charge on the real estate is merely a collateral security. But where the charge was originally on the real estate, the rule is not applied; for in such cases, the mortgage must be paid out of the land itself, and not out of the personal estate: for the collateral personal security is not to be resorted to, until the principal, which is the land, fails.

Exceptions:
Where the
Charge was
originally on
the Land.

§ 25. Lord *Coventry*, being tenant for life under his father's will, with a power to settle a jointure, covenanted, on his marriage, to settle a jointure of 500 l. a year on his intended wife, in pursuance of his power, or otherwise. Lord *Coventry* died, without having executed his power.

Coventry v.
Coventry,
2 P. Wms.
223.

One of the questions, in this case, was, whether the personal estate of Lord *Coventry* ought not to be first applied towards satisfaction of this covenant.

It was held, that Lord *Coventry*'s covenant bound the land, and could not be considered as creating a debt; and, therefore, there could be no application of the personal estate.

2 P. Wms.
439.

And, in a subsequent case, Sir *Joseph Jekyll*, after stating this case, said, “ It was contended that the
“ Countess ought to resort to the personal estate, for
“ that here were no particular lands covenanted to be
“ settled; and the covenant was to settle lands of 500 *l.*
“ *per annum* pursuant to the power, *or otherwise*: but
“ decreed by Lord Chancellor *Macclesfield*, with the
“ assistance of the Judges, that this covenant did bind
“ the land; and that the words, *or otherwise*, were in-
“ tended in favour of the jointress for her further se-
“ curity, in case the power should fail, or prove
“ deficient; and if so, they were not to be made use
“ of to her prejudice.”

Edwards v.
Freeman,
2 P. Wms.
435.

§ 26. *Richard Freeman*, on his marriage, covenanted to settle certain lands, to the use of himself for life, remainder to his intended wife for her jointure, remainder to the first and other sons of the marriage, in tail male, remainder to trustees for 500 years, to raise portions for daughters; if but one, 5000 *l.*

Freeman gave a bond in 8000 *l.* penalty, for the performance of this covenant. There was but one daughter of the marriage: the husband survived the wife, and married again, and died intestate, leaving issue.

On a question, whether this portion of 5000 *l.* was to be brought into hotchpot, as to the other issue, Sir *Joseph Jekyll* said, “ I do not take this 5000 *l.* to be a
“ debt due from the intestate, or to be paid out of his
“ personal estate. For though there is a bond for per-
“ formance

“formance of covenants from him, yet there is no
 “covenant for payment of the portion. The cove-
 “nant is to settle lands, and to raise a term of 500
 “years out of them, for securing the portion of
 “5000 l.

“It has been objected, that, had there been a cove-
 “nant to pay this portion, this had been like a mort-
 “gage, and the personal estate should have exonerated
 “the land. *Resp.* This is not like a mortgage; in
 “the case of a mortgage, the land is only a pledge for
 “the money borrowed: but here, the original agree-
 “ment was, that the portion should be raised out of
 “that very land.”

§ 27. Although the person in possession of the land should covenant for payment of the money due under such a charge, yet it will not subject the personal estate of the covenantor, in the first instance, to the payment of the money; for such a covenant is only considered as an additional security, and does not alter the nature of the debt.

Though there be a Covenant for Payment.

§ 28. *George Evelyn* the father, in pursuance of a power, mortgaged an estate whereof he was tenant for life, with remainder to his first and other sons, for raising 1500 l.

Evelyn v. Evelyn.
 2 P. Wms.
 659.

Upon an assignment of this mortgage, *George Evelyn* the son covenanted to pay the mortgage money. Upon the death of *George Evelyn* the son, it became a question, whether his personal estate should be applied

to pay off the mortgage made by his father, as he had covenanted to pay it.

Lord Chancellor *King*, assisted by Lord Chief Justice *Raymond*, and the Master of the Rolls, was of opinion, that the personal estate of the son should not be applied to pay off the mortgage made by the father; forasmuch as the charge was made by *George Evelyn* the father, in pursuance of his power. That this being the original debt of *George Evelyn* the father, though his personal estate, if any such were to be found would be liable thereto, yet the son's personal estate ought not to be charged with the father's debt; and notwithstanding that the son did afterwards, on the assignment of the mortgage, covenant to pay the mortgage money, yet, since the land was the original debtor, the covenant from the son would be considered only as a surety for the land.

Where the
Debt was
contracted
by another.

§ 29. Where the debt, although personal in its creation, was contracted originally by another, the personal estate of the owner of the descending lands shall not be applied in payment of it.

1 Salk. 450.
1 Ab. Eq.
270.

§ 30. Thus, if a grandfather mortgages his estate, and covenants to pay the mortgage money, and the lands descend to his son, who dies, leaving a personal estate, and a son, the intermediate son's personal estate shall not be applied in payment of the mortgage; for the debt was not contracted by him; and, therefore, his personal estate derived no advantage from it.

§ 31. A cove-

§ 31. A covenant to pay a mortgage created by another person, will not make the personal estate of the covenantor liable, in the first instance, to the payment of the money: for such a covenant is only an additional security, and does not alter the nature of the debt.

Although there be a Covenant.

§ 32. Sir *Edward Bagot* married the daughter and heir of Sir *Thomas Wagstaff*, and for raising part of her portion, Sir *T. Wagstaff* mortgaged part of his estate for 3500*l.* and died, leaving Lady *Bagot* his daughter and heir. The mortgagee wanting his money, Sir *Edward* joined in an assignment of the mortgage, and covenanted, that he, or his wife, or one of them, would pay the money. In consequence of which, a question arose, whether, by reason of this covenant, Sir *Edward's* personal estate should be liable to pay the same.

Bagot v. Oughton,
1 P. Wms.
347.

It was decreed, that this covenant by Sir *Edward* should not oblige his personal estate to go in ease of the mortgaged premises; forasmuch as the debt being originally Sir *Thomas Wagstaff's*, and continuing to be so, the covenant, upon transferring the mortgage, was an additional security for the satisfaction only of the lender, and not intended to alter the debt.

George Delaval, in 1722, mortgaged lands to *W. C.* to secure payment of 5000*l.* with interest at 5*per cent.*, and, by will made in 1723, devised the lands to his nephew *G. Shafto*, in tail male, remainder to the plaintiff in tail male, remainder over, and died soon after. In 1725, *G. Shafto* suffered a recovery to himself in

Shafto v. Shafto, cited
2 P. Wms.
664.

fee. The mortgagee calling for his money, *W. Gibbons* agreed to advance the 5000 *l.* at 4 *per cent.* on assignment of the mortgage, which was accordingly, by indenture of 4th *June* 1725, assigned to him, with a proviso for redemption on payment of the principal and interest at 4 *per cent.*, and *G. Shafto* for himself, his heirs, executors, and administrators, covenanted with *Gibbons*, that he, his heirs, &c. some or one of them, would pay to *Gibbons* the said principal and interest in manner therein mentioned. In 1779, *Shafto* agreed to raise the interest to 5 *per cent.*, and, by deed, covenanted with the mortgagees, that the estate should remain a security for the 5000 *l.*, with interest at 5 *per cent.*; and that he, his executors, &c. would pay such interest for the same. In *January* 1782, *G. Shafto* died, the interest on the mortgage being then in arrear for about ten months. The bill was brought (amongst other things) to have the 5000 *l.* and interest paid out of the personal estate of *G. Shafto*, or at least the arrear of interest due at his death, and the additional 1 *per cent.* charged by the deed of 1779. But Lord *Thurlow* was clearly of opinion, that the personal estate ought not to discharge the mortgage, the land being the primary fund. His Lordship also thought, that the interest must follow the nature of the principal; and that the contract for the additional interest, turning upon the same subject, must be in the nature of a real charge.

Or a Charge
on the Real
and Personal
Estate.

§ 33. Although a person should charge his real and personal estate with the payment of his debts, yet this will not render his personal estate liable to the payment of a mortgage created by his ancestor,

§ 34. *Hylton*

§ 34. *Hylton Lawson*, being seised in fee by descent of an estate at *Cramlington* in *Northumberland*, and of other real estates, both freehold and copyhold, devised the estate at *Cramlington*, (which was subject to a mortgage for 1,500 *l.* contracted by an ancestor), and also another estate to be sold; and charged the same, and also all his personal estate with the payment of his debts: and devised the residue of his real estate, in trust for his brother, in strict settlement.

Lawson v. Hudson,
1 Bro. Rep.
58. 3 Bro.
Parl. Ca. 424.

The question was, whether the personal estate of the testator was liable to the payment of this mortgage.

It was decreed by Lord *Thurlow*, that the personal estate was not liable.

On an appeal to the House of Lords, it was contended, 1st, That, although a devisee of a real estate has generally no right to call upon the personal estate of the testator to disincumber the real estate devised, of any debts not of his own contracting; yet, where there were words in the will which shewed the testator's intention that his personal estate should be applied, a court of equity would decree such application.

2dly. That in this case the testator's intention was clear, that this debt, as well as his own debt, should be discharged, out of the fund he had provided, for the purpose of carrying the whole real estate, or what should remain of it, in the course of succession which he had prescribed.

On the other side, it was said, 1st, That, by the established rules of equity, the personal estate of the testator, whose will does not require such an application of it, is not to be applied in favour of those who claim his real estate for the purpose of exonerating it from debts not originally contracted by such testator. Courts of equity distinguish between the debts of a testator and the debts of his estate. If the testator had received the money for which his real estate was pledged, his personal estate, having received the benefit of the charge made upon the real estate, would in equity be liable to disincumber the real estate. But if the testator's ancestor created the charge, the testator's personal estate not having received any augmentation, at the expence of the real estate, could not in such a case be considered as a debtor to it; and this held equally, whether the testator was seised in fee-simple, or for a less estate in the lands charged. This was the true principle of all the cases determined on the subject. The circumstance of the testator's having been personally liable was often mentioned, as the ground of decisions which have directed the application of personal estate in exoneration of real; but there were many cases in which courts of equity had refused to direct personal estate to be so applied, though the testator had entered into covenants, or other personal engagements, to pay the debt for which the real estate had been pledged by his ancestors, or those through whom he claimed. Each of these principles, however, would exempt the personal estate of *Hylton Lawson* from being applied towards discharging this mortgage
upon

upon the *Cramlington* estate, which was contracted by his father, unless the will of *Hylton Lawson* required it to be so applied.

adly, There was no express mention made of the debt in *Hylton Lawson's* will, nor any clause that afforded a proof that he considered it as his debt. The testator created a fund for the payment of his debts, legacies, and funeral expences: but to apply that fund or any part of it in discharge of the mortgage debt, would be to dispose of it for the payment of a debt which certainly was not his debt, in contemplation of law.

The decree was affirmed,

§ 35. Where a person only purchases an equity of redemption, his personal estate will not be applied towards payment of the mortgage money, in exoneration of the real estate,

Where only an Equity of Redemption is purchased.

§ 36. Mr. *Leigh*, the testator, had purchased several estates subject to mortgages, with regard to one of which he entered into a covenant for payment of the mortgage money, for the purpose of indemnifying a trustee; and, as to another, which was a part only of an estate, subject to a mortgage; upon splitting the incumbrance, both parties covenanted to pay their respective shares, and indemnify each other.

Forrester v. Leigh, cited 2 P. Wms. 664.

Lord *Hardwicke* thought these covenants would not have the effect of making the mortgages personal debts of

of the testator, they having been entered into for particular purposes; and declared his opinion accordingly in the decree.

Tweddell v.
Tweddell,
2 Bro. Cha.
Rep. 101.

§ 37. *John Aynefley* purchased an estate from *William Aynefley*, which was subject to a mortgage for 2,000 l.; and not having paid off the mortgage, he devised the lands, (together with other real estates), but subject nevertheless to the payment of all his debts, to his son, &c., in strict settlement.

The question was, whether the personal estate of *John Aynefley* should be applied in discharge of this mortgage.

Aucafter v.
Mayer,
1 Bro. R.
454.

Lord *Thurlow* said, this case was exactly the same with that of *Rochford v. Belvidere*, 5 Bro. Parl. Ca. 299. where the House of Lords decreed, that the personal estate was liable to the payment of the mortgage; but, notwithstanding, his Lordship said he was of a different opinion. The personal estate never was liable, nor was the party ever liable to an action for recovery of the money; and therefore it ought not to be applied in payment of the mortgage.

Unless the
Purchaser
makes it his
own.
1 Vern. 36.
2 Bro. Rep.
608.

§ 38. Where it appears to have been the intention of the purchaser of an equity of redemption to make the debt his own, there his personal estate will be applied in payment of the money due upon it.

Parsons v.
Freeman,
Amb. R. 115.

§ 39. A person agreed to purchase an estate which was in mortgage for 90 l., of which he covenanted to pay

pay 86 *l.* to the mortgagee, and 4 *l.* to the owner of the estate. The purchaser died; and the question was, whether the heir at law was entitled to have the money paid out of the personal estate of the purchaser.

Lord *Hardwicke* was of opinion that he was. 1st, It was an express contract to pay, and the representative of the mortgagor might maintain an action for the money: and so might the mortgagee oblige the mortgagor to let him make use of his name to recover the money. This was as strong a case as could well come before the court.

2dly, It being agreed to be part of the purchase money, the heir would (if there was nothing more in the case) be entitled to have the money paid out of the personal estate; as where one articles to purchase an estate, and dies before the purchase is completed.

§ 40. Where the husband and wife join in a mortgage of the wife's estate, the personal estate of the husband shall be first applied in payment of the mortgage. But where the greater part of the money was borrowed to pay off a debt due from the wife, *dum sola*, the personal estate of the husband will not be applied.

Mortgages
by Husband
and Wife.

Brend v.
Brend,
1 Vern. 213.

Lewis v.
Nangle,
Amb. 150.

§ 41. In a late case of this kind, it was decreed that the wife, having by a declaration to the executor of her husband, clearly disclaimed her right, could not require payment of him,

Clinton v.
Hooper,
3 Bro. R.
201.

§ 41. Where

Proportions
between
Tenant for
Life and
Remainder
Man.
Ballet v.
Spranger,
Proc. in Cha.
62. 1 Ves.
428.

Clyatt v.
Battison,
1 Ab. Eq.
117.

Newling v.
Abbot,
1 Vin. Ab.
186.

Kirkham v.
Smith,
1 Ves. 258.

§ 42. Where the equity of redemption belongs to a person for life only, with remainder in fee to another, the general rule is, that the tenant for life shall pay one-third, and the remainder man two-thirds, of the money due on the mortgage.

§ 43. But where the mortgage is not redeemed during the life of the tenant for life, the person in remainder cannot compel the representative of the tenant for life to contribute towards the payment of the mortgage money.

§ 44. If a tenant for life of an equity of redemption pays off the mortgage money, and procures the term to be assigned to a trustee for himself, and makes improvements and dies, and afterwards the remainder man comes to redeem, the representatives of the tenant for life shall have an allowance of two-thirds of the lasting improvements, but nothing for the other third, because he received the benefit thereof during his life. And no interest shall be allowed during the life of the tenant for life for the money paid, for he is bound to keep down the interest during his life.

§ 45. Where the person who is possessed of the equity of redemption has such an interest in the estate that he can secure the money laid out by him to redeem on the estate, the remainder man will be obliged to pay him or his representatives all he has advanced.

§ 46. *A.*, tenant in tail of an equity of redemption under his father's will, paid off a mortgage secured on the

the estate by a term for years, but neglected to procure an assignment of the term, and afterwards devised the lands. The remainder man claimed the estate tail as not barred, discharged of the incumbrance.

The Chancellor held, that there being a term for years in the mortgagee, which stood out in point of law, as it did before, no assignment in law having been made thereof, none of the parties before the court had the legal estate, for a conveyance of which the plaintiffs came; and, therefore, *that* conveyance must be upon equitable grounds. That, so far as it appeared, tenant in tail paid it off with his own money. That he might have taken an assignment of the term, either in trust to attend the inheritance, which would have ended the question, or in trust for himself, his executors, or administrators, which would, notwithstanding the remainder over, have kept this incumbrance on foot for the benefit of his personal estate, and those entitled thereto; or that he might have called for an assignment of it during his life, if he had discovered this limitation in remainder; that it might have been made for the benefit of his executors, not of the remainder. But his not doing any of these, clearly proved that he conceived he had the absolute ownership of the estate: and the court could not decree to persons claiming this, in contradiction to his apprehension and intent, a conveyance of the inheritance, and likewise of the term, without making a satisfaction to the personal estate of the tenant in tail, as that would be contrary to the maxim, that he who would have equity must do equity. The plaintiffs were decreed to
have

have the estate, subject to the money paid by the tenant in tail, in discharge of the mortgage.

Tit. 3. f. 88. § 47. Where a person who is tenant for life of an equity of redemption pays off the mortgage money, his representative will be entitled to call on the persons in remainder for all the principal money so paid.

Of Interest. § 48. In all mortgages, it is expressly stipulated, that the mortgagor shall pay interest for the money borrowed. But in consequence of 12 *Anne* stat. 2. c. 16. f. 1., all assurances for the payment of any principal money to be lent, whereupon there shall be reserved or taken above 5 *per cent.*, shall be utterly void.

3 Atk. 154. § 49. Lord *Hardwicke* is reported to have said, that if a mortgage be drawn only for 5 *per cent.*, and the mortgagor takes 6, it would be void upon the word *take* in the statute.

§ 50. By the statute 14 *Geo.* 3. c. 79., it was enacted, that all mortgages which should be made and executed in *Great Britain*, of or concerning any lands, tenements, hereditaments, &c. being in the kingdom of *Ireland*, or in any of the *British* colonies or plantations in the *West Indies*, to any of his Majesty's subjects, and all bonds, covenants, and securities for payment thereof, and the interest thereof, and all transfers and assignments thereof, shall be as good and effectual as if the same were made and executed in the kingdom, island, plantation, or place where the lands, &c. severally

verally lie or are, provided the interest does not exceed 6 per cent.

§ 51. It has been usual, where the interest of money lent on mortgage is reserved at 5 per cent., to insert a proviso, that if it is punctually paid, the mortgagee will accept of 4 or $4\frac{1}{2}$ per cent., which is allowed to be good. But where the interest reserved was 5 per cent., with a proviso, that if it was not paid within two months after it became due, it should be raised to $5\frac{1}{2}$ per cent., and the interest was not paid within two months; the Court of Chancery would not allow the mortgagee to recover the additional half per cent., because it was in the nature of a penalty, and therefore relievable in equity.

Agreement to lower Interest.

Tory v. Cox, Prec. in Ch. 160.

Nichols v. Maynard, 3 Atk. 520.

§ 52. It is said in some of the old cases, that where there is a *covenant* for payment of additional interest, the Court of Chancery will not relieve against it. But this must be a mistake; for there can be no difference between creating a penalty by proviso, or by covenant.

Prec. in Ch. 160.
2 Vern. 134.

§ 53. It has been laid down, as a general rule, that interest shall not be allowed upon interest.

Interest upon Interest not generally allowed.

§ 54. Thus, where a mortgagee compelled the mortgagor to agree, that the interest should be turned into principal at the end of every six months, Lord *Hardwicke* relieved the mortgagor, and said, that interest was seldom allowed to be turned into principal, except upon the advance of fresh money; and, even then,

Thornhill v. Evans, 2 Atk. 330. Salk. 449.

then, it was reckoned an hardship upon the mortgagor; and an act of oppression.

Exceptions :
Where a
Mortgage is
assigned.

Ashenburt
v. James,
3 Atk. 271.

§ 55. There are, however, several exceptions to this rule. 1st, When the mortgagee assigns over the mortgage to a stranger *bonâ fide*, with the consent of the mortgagor, all money paid by the assignee, that was due to the mortgagee, shall be considered as principal; and the assignee shall have interest upon the interest then due, and paid by him, as well as upon the principal originally lent.

Where there
is a stated
Account.

§ 56. 2d, Where an account is regularly stated between the parties, it will carry interest; because, in such a case, there is an implied contract on the part of the debtor to pay.

Boddam v.
Riley, 2 Bro.
Rep. 3.

But this does not extend to cases where there is no settlement or acknowledgment by the debtor.

Where an
Account is
settled by
a Master.

Treat of Eq.
V. 2. b. 5.
c. 1. f. 5.

§ 57. 3d, Where an account is settled between a mortgagor and mortgagee by a master pursuant to order, and such account is confirmed by the court, interest will be allowed upon interest, from such confirmation, though part of it be in respect of costs.

Where the
Time is
enlarged.

§ 58. Where the court enlarges the time for the mortgagor, that is a favor, for he would otherwise be foreclosed; and it is but just and reasonable that he should pay for it.

§ 59. On

§ 59. On a bill to foreclose, principal, interest, and costs, are lumped into one sum by the master; and if the mortgagor, or a puiſne mortgagee pray longer time to redeem, they muſt pay interest for the whole ſum.

Neale v. Att. Gen. Mosel. 246.

§ 60. In the caſe of an infant, interest is not generally allowed upon interest, for one of the grounds upon which interest is turned into principal is as a puniſhment on the mortgagor for the non-performance of his contract, which ought not to operate againſt an infant. But where a benefit accrues to the infant, it is otherwiſe.

Exception: Infants. 2 Vern. 392.

§ 61. J. S. mortgaged his eſtate to the plaintiff, and died leaving the defendant his daughter and heir, who was an infant, and had nothing to ſubſiſt on but the rents of the mortgaged eſtate; and the interest being ſuffered to run in arrear three years and a half, the plaintiff grew uneaſy at it, and threatened to enter on the eſtate, unleſs his interest might be made principal; upon which, the defendant's mother, with the privity of her neareſt relations, ſtated the account, and the defendant herſelf, who was then near of age, ſigned it. And the account being admitted to be fair, it was held, that though regularly interest ſhould not carry interest, yet in ſome caſes, and upon ſome circumſtances, it would be injuſtice, if interest ſhould not be made principal; and the rather in this caſe, becauſe it was for the infant's benefit, who, without this agreement, would have been deſtitute of ſubſiſtence.

Cheſterfield v. Cromwell, 1 Ab. Eq. 287.

Who are
bound to
pay interest.

§ 62. All persons seised in fee of lands which are in mortgage, are bound to pay the interest; and even a tenant for life may be compelled by the person in remainder or reversion, to keep down the interest of a mortgage; for, otherwise, it would fall on the person in remainder or reversion.

§ 63. If there be tenant in tail, remainder over, subject to a mortgage, and the tenant in tail is in possession and receipt of the rents and profits, and lets the interest run in arrear, neither the issue in tail, nor the remainder man, can come against the tenant in tail to compel him to pay the interest incurred during his possession. For in such a case, courts of law, as well as of equity, consider the remainder man or reversion to be in the power of the tenant in tail.

Chaplin v.
Chrpl'n,
& P. Wms.
235.

§ 64. A person made a mortgage for years, and then intailed the estate mortgaged on himself, and the heirs male of his body, remainder to his brother in tail male, and died, leaving issue an infant son, who suffered the interest to incur on the mortgage for several years, and died just before he came of age, leaving a personal estate. Whereupon it was objected, that the executors of the infant son, seeing their testator took the rents and profits of this estate, ought to keep down the interest, the rather for that he never had it in his power to bar the remainder by a recovery.

Lord Chancellor.—There is no precedent of a tenant in tail being obliged to keep down the interest on
a mort-

a mortgage; a tenant for life is, without doubt, compellable to do it; but as a tenant in tail has an estate which may last for ever, and the remainder over is not affets, nor regarded in law, and, as such tenant in tail has a power over the estate to commit any waste, or spoil thereon, a court of equity has never enjoined him to keep down the interest. Wherefore, his Lordship refused to make any order upon the executors of the tenant in tail to pay any arrears of interest, though it appeared there was near 20 years interest due, and though, in this case, the tenant in tail died during his infancy, and, consequently, before it was in his power to have barred the remainder by a recovery.

§ 65. In a subsequent case, it was determined, that although a tenant in tail of full age, is not obliged to keep down the interest of a mortgage for the benefit of the remainder man or reversioner, yet, that where an infant is tenant in tail of lands which are mortgaged, and his guardians or trustees are in the receipt of the rents and profits, he shall be liable to the payment of the interest, as far as the rents and profits will extend.

§ 66. *Jane Pitt* was tenant for life, with power to charge any sum not exceeding 4000 l. on the estate which was limited to her son, *William Pitt*, in tail, remainder to the right heirs of his father. *Jane Pitt* charged the estate accordingly, and died. *William Pitt* died without issue, and under age, leaving the interest in arrear. The court determined, that *William Pitt* being an infant, the guardian ought to have applied the rents and profits of the estate to keep down the interest,

Sarjeson v. Cruise,
1 Ves. 478.
2 Atk. 416.

interest, in discharge of the incumbrance; and, therefore, what ought to be done by the guardian, should be considered as done; and consequently the real estate discharged, so far as the rents and profits in the life of the infant would go in discharge: but if that was not sufficient, it was to be an incumbrance on the remainder.

Amesbury v. Brown,
1 Vef. 477.

§ 67. But if tenant in tail of land, or the husband of a tenant in tail, pays the interest of a mortgage on the estate tail, neither he, nor any person in his place, will be permitted to set up that as a fact undone; but the remainder man shall have the benefit of it.

Mortgage Money is payable to the Executor.

Thornbrough v. Baker,
1 Cha. Ca. 283.

§ 68. In consequence of the principle, that all mortgages are part of the personal estate, it is now fully established, that the money due upon mortgage is to be paid to the executor. And as in all cases of mortgages, the money borrowed is the principal, and the land the accessory, it follows, that when the debt is discharged, the interest of the mortgagee in the land ceases.

Winne v. Littleton,
2 Cha. Ca. 51.

§ 69. Where a person having a mortgage in fee, devised all his lands and tenements to the plaintiff, and, after giving several legacies, gave all the residue of his personal estate to (leaving a blank which he never filled up) whom he made sole executor. The plaintiff, as devisee of all the lands and tenements, claimed the mortgage money. But the administratrix insisted, that, by the rule and course of the court, where lands were mortgaged, the money was accounted part of the personal

personal estate, though the mortgage was in fee, and even where the money was made payable to the mortgagee and his heirs : and that the personal estate being devised to the executor, was a good declaration that it should go to the executor, though void as a devise, for want of naming an executor ; and, consequently, belonged to the administratrix. And it was decreed accordingly.

Canning v.
Hicks,
2 Cha. Ca.
187.

§ 70. It has been determined, that parol evidence of the payment of the debt is admissible : so that mortgages may, in some respects, be said not to be within the statute of frauds.

Ante, ch. 2.

TITLE XV.

MORTGAGE.

CHAP. V.

Of the Order in which Mortgages are to be paid, and the Means by which a Priority may be gained.

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| <p>§ 1. Mortgages are paid according to their Priority.</p> <p>3. Legal Incumbrances preferred to equitable ones.</p> <p>5. Priority may be lost by Fraud.</p> <p>11. Where Possession of the Title Deeds will give Priority.</p> <p>17. Defective Mortgage not preferred to a subsequent effective one.</p> <p>19. But will be preferred to Judgements.</p> <p>22. Of tacking subsequent to prior Incumbrances.</p> <p>31. None but Purchasers without Notice can tack.</p> <p>33. How far the first Incumbrance will protect.</p> | <p>38. A first Mortgagee may tack a Judgement.</p> <p>40. But a Judgement Creditor cannot tack.</p> <p>42. A Term assigned to attend, &c. may be got in by an Incumbrancer.</p> <p>48. This Doctrine weakened by some Determinations at Law.</p> <p>49. A puisne Mortgagee must have the best Right to the legal Estate.</p> <p>51. At what Time a prior Incumbrance may be got in.</p> <p>56. Of Notice.</p> <p>57. Direct Notice.</p> <p>60. Constructive Notice.</p> |
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Section 1.

Mortgages are paid according to their Priority.

1 Vern. 525.
Symes v.
Symonds,
4 Bro. Parl.
Ca. 328.
1 Ab. Eq.
142.

WHERE there are several mortgages on an estate, they must be paid according to the priority of their respective dates, in pursuance of a rule adopted from the civil law: *Qui prior est tempore, potior est jure*. It should, however, be observed, that mortgages are not preferred, in a court of equity, to statutes, judgments, or recognizances: but each of these securities takes place according to the priority of its date.

§ 2, Where

§ 2. Where there are several equitable interests affecting the same estate, they will also attach upon it, according to the respective times at which they commenced; it being a rule in Chancery, that equity follows the law.

2 P. Wms.
495.

§ 3. But where incumbrances are merely equitable, a mortgage of the legal estate to a person who has no notice of such incumbrances, will give the mortgagee a priority over them. If, however, any of the equitable incumbrances are excepted, that circumstance will give them a priority over those that are not excepted.

Legal Incumbrances preferred to equitable ones.

§ 4. A person seized of an estate subject to several equitable incumbrances, conveyed it in mortgage, free from incumbrances, excepting some of the equitable incumbrances, which were later in point of date than others.

Ingram v. Pelham,
Amb. 153.

Lord *Hardwicke* observed, that scrivener and bankers who lent large sums of money on securities, and then gave derivative securities by declarations of trust, might as well be trusted upon their personal credit, because it was in their power to defeat all their equitable creditors, by conveying the legal estate to another: and decreed, that the mortgagee was a trustee for the excepted creditors, who were, by means of the notice, preferred to those that were not excepted.

§ 5. The priority of payment, according to the date of each mortgage, or other incumbrance, may be lost

Priority may be lost by Fraud.

Treat. of Eq.
b. 1. c. 3. f. 4.

by any fraud or artifice of the first mortgagee, in concealing his own mortgage, for the purpose of inducing another person to lend money on the same lands. For, in such a case, the Court of Chancery will give a priority to the subsequent incumbrancer.

Draper v.
Borlace,
2 Vern. 370.

§ 6. A person, who was a counsellor, having lent 8000*l.* to *A.* upon a mortgage in fee of a manor, and on a statute, in the penalty of 16,000*l.*, was afterwards consulted by *B.* as to a loan of 2000*l.* to *A.* He encouraged him to lend the money, drew the mortgage deed, and inserted a covenant, that the estate was free from incumbrances. It was decreed, that *B.*, the second mortgagee, should have a priority.

Berisford v.
Milward,
2 Atk. 49.

§ 7. A mortgagee was present when the mortgagor was in treaty for the marriage of his son with the daughter of *A.*, the son's intended wife, and the lands incumbered, being agreed to be settled upon this marriage, to the husband for life, to the wife for life, remainder to the issue male and female, it was not opposed by the mortgagee, but he fraudulently concealed his mortgage, and, at the same time, privately assured the father of the son, that he would trust to his personal security. It was decreed, that the son, and the issue of this marriage, should hold the lands quietly against the mortgagee and his heirs,

§ 8. But when the party to whom the fraud is imputed was not conusant of the treaty in which the fraud was practised, nor in any manner, nor for any fraudulent
lent

lent purpose, confederating with the party practising the fraud, this principle does not apply.

§ 9. Thus, if a person intending to advance money on mortgage, applies to a prior incumbrancer, to know whether he has any charge upon the estate, on which he intends to lend money, and he denies that he has any charge, he will thereby lose his priority. But the person intending to advance the money, or his agent, must inform the prior incumbrancer, that he intends to lend money on the lands; for the prior incumbrancer is not bound to answer, unless he knows of such intention, as the question may be asked merely to satisfy an impertinent curiosity.

Ibbotson v. Rhodes,
2 Vern. 554.

Vide Pasley v. Freeman,
3 Term R. 51.

§ 10. It was formerly held, that if a mortgagee was witness to a second mortgage deed, it would gain to the second mortgagee a priority. But, in a subsequent case, Lord *Hardwicke* is reported to have said, that he did not think the bare attesting a deed by a person as a witness, would create such a presumption of his knowledge of the contents, as to affect him with any fraud therein; for a witness is only to authenticate it, and not to be privy to the contents. And, in a modern case, Lord *Thurlow* is reported to have said; “ I do not leave this as a case which I should determine in the same manner; for a witness, in practice, is not privy to the contents of the deed,”

Mocatta v. Murgatroyd,
1 P. Wms. 393.

Wilford v. Beezely,
1 Ves. 6.

Becket v. Cordley,
1 Bro. Rep. 353.

§ 11. It has been laid down as a rule in a modern case, that where a second mortgagee is in possession

Where Possession of the Title Deeds will give a Priority.

Goodtitle v.
Morgan,
1 Term R.
762.

session of the title deeds, that circumstance will entitle him to a priority over the first mortgagee; because, where a person lends money upon mortgage, and does not require the delivery of the title deeds, he thereby enables the mortgagor to practise a fraud upon a third person.

Treat. of Eq.
b. 1. c. 3. f. 4.

§ 12. This rule is, however, much too general, as there are many cases in which the title deeds cannot be delivered up; and, therefore, it is now settled, that nothing but a voluntary, distinct, and unjustifiable concurrence on the part of the first mortgagee to the mortgagor's retaining the title deeds, shall be a reason for postponing his priority.

Peter v.
Russell,
1 Ab. Eq.
321.

§ 13. Thus, where it appeared, that the mortgagor obtained possession of the title deeds from the first mortgagee, upon a reasonable pretence, Lord *Cowper* dismissed the bill brought by the second mortgagee to postpone the first.

Penner v.
Jemmett,
Treat. of Eq.
b. 1. c. 3. f. 4.

§ 14. Mr. *Fonblanque* mentions a case, where it appearing that the first mortgagee had required, and was assured by the mortgagor, that he had delivered to him all the title deeds, Lord *Thurlow* held, that there must be a voluntary leaving of the deeds to entitle the second mortgagee to gain a priority.

Tourle v.
Rand,
2 Bro. R.
650.

§ 15. In another case, Lord *Thurlow* held, that a mortgagee of a reversion, who had not the title deeds, should not be postponed to another mortgagee, whose mortgage

mortgage was made after the mortgagor had come into possession, and who had got the title deeds, there being neither fraud nor gross negligence.

Vide *Plumb v. Flint*,
Anst. R. 432.
6 Vef. jun.
183.

§ 16. But when a second mortgagee has got possession of the title deeds, a court of equity will not take them from him, unless the first mortgagee pays him his money.

Head v. Egerton,
3 P. Wms.
279.

§ 17. If a person mortgages his lands by a defective conveyance, and afterwards mortgages them, by an assurance that is good and effectual, to a person who has no notice of the defective conveyance, the second mortgage will prevail, because that carries the legal estate. And equity will not interfere where both parties are equally innocent.

A defective Mortgage not preferred to a subsequent effective one.
1 Ab. Eq.
320.
Ante, f. 3.

§ 18. Copyhold lands were mortgaged, but without a surrender. They were afterwards mortgaged to another person, and surrendered to him. The second mortgagee was admitted, and brought his ejectment; and the first mortgagee brought his bill to be relieved. The Master of the Rolls, on solemn agreement, dismissed the bill with costs; and held, that equity would not supply the defect of a surrender, against a person who came in by title, upon surrender of the same premises. The case was reheard before Lord *Cowper*, who was of the same opinion, and took this difference, that when there are two persons that have equal equity, then those that have the legal title shall prevail; because there is no equity to take from such persons the title that they have gained at law.

Oxwick v. Plumer,
5 Bac, Ab.
43.

§ 19. But

But will be
preferred to
Judgments.

1 Ab. Eq.
320.

§ 19. But if a person mortgages his land by a defective conveyance, and there be subsequent debts, which did not originally affect the land, there the defect of such conveyance will be supplied in equity against incumbrancers, who afterwards acquire a legal title to the land. For, since the subsequent incumbrancers did not originally take the lands for their security, nor had an intention to affect them, when afterwards the lands are affected, and they come in under the person who was obliged in conscience to make the security good, they will not be allowed to stand in his place, but will be postponed to such defective conveyance.

Burgh v.
Francis,
1 Ab. Eq.
320. 5 Bac.
Ab. 41.

§ 20. *Henry Francis*, father of the defendant *Henry*, in consideration of 400 l. money lent, by feoffment, 17th July 1665, mortgaged to the plaintiff's testator in fee, a piece of ground called *Pursfield*, in the parish of *Gibs*, but made no livery thereon, and covenanted for him and his heirs, that he was lawfully seised in fee of the premises, and for quiet enjoyment, free from incumbrances, against him and his heirs, and all persons claiming under him, with covenant for further assurance within seven years. *Henry Francis* the father, borrowed of the testator 77 l. on bond, and promised, that the mortgaged premises should be security for it. *Henry Francis* the father, in 1670, made his will, and thereof made *Henry Francis* the son executor. The testator *Robert Burgh* died, and the plaintiff *Eleanor* proved his will. The defendant *Henry Francis* confessed several judgments on bonds entered into by his father, (to wit), seven judgments, as heir, and one

as executor to his father. One of these seven judgments was obtained by *Heyman*, a defendant, on an action brought the first or second day of *Hilary* term 1670, for 400 l., and all the other judgments were entered about the same time. This cause came on to be heard by Sir *Heneage Finch* Lord Keeper, assisted by Judge *Wild*, who declared that the court was fully satisfied that the plaintiff ought to be relieved; and that the said judgments ought not to incumber the premises till the mortgage money was fully paid; wherein the court did not ground its opinion upon the manner of obtaining the judgments, all in the term, and most of them together, nor on the special way, whereby the heir charged the lands by pleading *rien per descent*, nor on the priority of the *teste* of the original, on which the judgments were grounded: but upon the true nature of the case, the court declared, that the debt due by mortgage did originally charge the lands, which the bonds did not, till they were reduced to judgments; and it ought not to be in the heir's power, by confessing judgments, to charge the lands, in prejudice to that equity; and the rather because of the covenant for further assurance: and though the mortgage was defective in law, for want of livery, yet equity, which supplied that defect, charged the lands; and though the creditors had no notice, yet they should be bound in this case, because they were put in no worse condition than they ought to be, *viz.* to be postponed to the mortgage. Therefore it was decreed, that the defendant *Henry*, the heir, should convey to the plaintiff, or her assigns in fee, in manner as a master should direct, but redeemable on the payment of the said 400 l.
due

due on the former defective mortgage; and the premises to be held quietly against the plaintiffs, and all claiming under them, since the date of the mortgage; and he who has the equity of redemption may, in convenient time, bring a bill to redeem; and, in default thereof, the now plaintiffs may bring one to foreclose; and a perpetual injunction was also awarded to quiet the plaintiffs, and their assigns in possession, against all the defendants, and the aforesaid incumbrances, and to stay all proceedings at law; but the plaintiffs to have no costs of this suit, unless some come to redeem; then the now plaintiffs to have all costs of this and such suits, as was usual in the redemption of mortgages.

Taylor v.
Wheeler,
2 Vern. 564.

§ 21. *A.* surrendered a copyhold estate, by way of mortgage, for money lent, but the surrender was not presented. *A.* became a bankrupt, and his assignees were admitted to the copyhold, and brought their ejectment. The mortgagee brought his bill in Chancery to be relieved. The court decreed a perpetual injunction in behalf of the mortgagee. For though it was said that the creditors of the bankrupt were equally valuable as the mortgagee, and having the title at law, they ought to be preferred, yet it was over-ruled; because the other creditors of the bankrupt did not lend on the credit of the land, as the mortgagee did. And therefore when such creditors come under the bankrupt to charge the land, they ought to stand in his place, and come under the same obligation of conscience, to make good the defective security.

§ 22. One of the great objects of the common law was, to protect and secure honest purchasers, who had long been in possession of lands. It is to this principle that fines and non-claim, descents which take away entries, and collateral warranties, owe their origin and effects. The courts of equity, whose duty it is to follow the rules of the common law, soon adopted the same doctrine; and laid it down as a rule, that an honest purchaser or mortgagee, (who is a purchaser *pro tanto*), without notice of any defect in his title, or of any incumbrance on the estate, at the time of his purchase, shall not have his title impeached in equity. Neither shall he be compelled to discover any writings or other things which may weaken his title: nor will the Court of Chancery take any advantage from him, by which he may defend himself at law.

Of tacking subsequent to prior Incumbrances.

Tit. 35.

1 Ab. Eq. 333. 1 P. Wms. 491.

1 Vern. 52. Sherley v. Fagg, 1 Cha. Ca. 68.

§ 23. In consequence of these principles, it has been long settled by the Court of Chancery, that if a person purchases an estate, or advances money upon a mortgage of it, without having any notice, at the time of his purchase or mortgage, of any incumbrance affecting it, and afterwards finds out that there are incumbrances, and, upon such discovery, obtains a conveyance of an outstanding legal estate, prior to the incumbrance so discovered, to a trustee for himself, the Court of Chancery will not interfere, to set aside such incumbrance; so that he will be thereby effectually secured from the mesne incumbrancer. For the circumstance of his purchasing without notice, gives him equal equity with the mesne incumbrancer, and, by obtaining a conveyance of the outstanding legal estate, he

1 Ab. Eq. 322. 2 P. Wms. 491.

Francis 61.

he acquires a title at law; so that he comes within the maxim, that, where equity is equal, the law must prevail.

Rep. Temp.
Finch, 103.
2 Vef. 573.

Vide Wortley
v. Birkhead,
Infra.

§ 24. Besides, the person who has the mesne incumbrance, having only a title in equity, cannot prevail against one who has an equal title in equity and the legal estate; it being also a maxim in Chancery, that, *In æquali jure melior est conditio possidentis*. And Lord Keeper *Finch* observes, that precedents of this kind are very ancient and numerous, where the court has refused to give assistance against a purchaser, either in favor of the heir, or the widow, the fatherless, or creditors, or to one purchaser against another.

Marth v. Lee,
2 Vent. 337.
1 Cha. Ca.
162.

§ 25. One *English* mortgaged the manor of *Wishat* for 1000 *l.*, and afterwards acknowledged a statute to the mortgagee for 800 *l.* *English* mortgaged the same lands some time after for 700 *l.*, and, lastly, mortgaged them to one *Lee* for 200 *l.* *Lee* had no notice of the former incumbrances when he lent his money, but having discovered the mortgage for 700 *l.*, he purchased in the preceding mortgage and statute. And the question was, whether he should by that means protect himself against the mortgage for 700 *l.*

The Lord Keeper, assisted by Lord Chief Baron *Hale*, and Justice *Rainsford*, held, that *Lee* might make use of these incumbrances to protect his own mortgage, as he had both law and equity on his side; for, first, he had the legal title, by having purchased in the preceding mortgage and statute; and, secondly, he

He had equal equity with the mortgagee for 700*l.*, by having lent his money without notice of any preceding incumbrance. And Lord Chief Baron *Hale* observed, that this point had been determined by the Court of Exchequer, in one *Shelley's* case; and Sir *H. Finch*, counsel for *Lee*, cited *Primate v. Jackson*, *Grove v. Grove*, and *Mrs. Calamy's* case, in all which the Court of Chancery had determined, that a purchaser, or a mortgagee for a valuable consideration, without notice, who took in a precedent incumbrance, should thereby protect his estate against any person who had a mortgage subsequent to the first, and before the last mortgage, although he had purchased in the incumbrance after he had notice of the second mortgage.

§ 26. It is the same where a mortgagee can obtain an assignment of a statute, recognizance, or judgment; for, in that case, he will be entitled to extend the lands, or take half of them on a writ of *elegit*, and, by that means, hold them until he has received all that is due upon the statute, or other security so purchased, and also on his mortgage, before the second mortgagee can receive any thing.

Higgon v. Syddal,
1 Cha. Ca.
149.

§ 27. There were first, second, and third mortgagees, who had all lent their money without notice. The third mortgagee hearing of the two former securities, bought in the first incumbrance, which was a satisfied judgment. And it was strongly insisted at the bar, that though the trade of buying in incumbrances had been formerly countenanced, yet that it was, in truth, a thing against conscience, and contradictory to

Edmunds v. Povey,
1 Vern. 187.

Sadler v.
Bush,
2 Vern. 30.

Ante, l.

many established rules of law and equity. Lord Keeper *North* said, he wondered the counsel laid their shoulders to a point that had been so long settled, and received as the constant course of Chancery. It was true, there had been strong arguments used against the unreasonableness of this practice, and there might be likewise strong reasons brought for the maintaining of it; and so was at first a case very disputable: but being once solemnly settled, as it was in the case of *Marsh v. Lee*, he would not now suffer that point to be stirred.

§ 28. Where a clause is inserted in a mortgage deed, by which the lands are made a security for any farther sums which shall be borrowed by the mortgagor from the mortgagee, a subsequent loan will be considered as part of the original transaction, and will have a priority over a second mortgage although subsequent to such second mortgage, and although the first mortgagee had notice of it, at the time when he advanced his money.

Gordon v.
Graham,
7 Vin. Ab.
52.

§ 29. *A.* mortgaged to *B.* for a term of years to secure a sum of money already lent, and also such other sums as *B.* should afterwards lend or advance to him. *A.* made a subsequent mortgage to *C.* for a certain sum, with notice of the first mortgage, and then the first mortgagee, having notice of the second mortgage, advanced a farther sum. The question was, upon what terms the second mortgagee should redeem the first mortgage.

Lord,

Lord Cowper.—The second mortgagee shall not redeem the first mortgage, without paying all that is due, as well the money lent after, as that before the second mortgage was made: for it was the folly of the second mortgagee, with notice, to take such a security.

§ 30. If a purchaser buys in an old incumbrance first, and afterwards purchases the inheritance, the consequence will be the same; provided the purchaser had no notice of the prior incumbrance at the time of his purchase. 1 Vern. 52.

§ 31. A mortgagee shall not protect himself by taking a conveyance from a trustee, after notice of the trust, for, in that case, he becomes himself a trustee. None but Purchasers without Notice can tack. Tit. 12.

§ 32. *Ann Bayly* being possessed of a term for years, made a voluntary settlement thereof, in trust for herself for life, remainder to her daughter *Isabella Barnes* for life, remainder to the children of *Isabella* by Mr. *Barnes* her then husband. *Isabella* mortgaged the lands in question to the plaintiff, who pretended he had no notice of the settlement. But, having afterwards got notice of it, he procured an assignment of the term from the trustees. Saunders v. Dehen, 2 Vern. 271.

The court said, that though a purchaser may buy in an incumbrance, or lay hold on any plank to protect himself, yet he shall not protect himself by the taking a conveyance from a trustee after he had notice of the trust: for, by taking a conveyance with notice of the trust, Vide Tit. 12. c. 1. s. 62.

trust, he himself became the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust.

How far the first Incumbrance will protect.

§ 33. If the first incumbrance only extends to part of the estate comprised in the latter mortgages, it will only protect the part thus comprised. But if the first incumbrance extends to estates not comprised in the subsequent mortgages, the puisne mortgagee shall hold all the estates until he is satisfied.

Bovey v. Skipwick,
1 Ch. Ca.
201. 1 Ab.
Eq. 323.

§ 34. A person mortgaged the manor and rectory of *D.* to *A.*, and afterwards mortgaged the rectory to *B.*, without notice of the mortgage to *A.*, and then *B.* purchased in a precedent incumbrance, on both the manor and rectory. The question was, when *B.* had received all the money due on the first security; whether he should receive any more profits of the manor, or only keep the incumbrance on foot to protect the rectory. This was argued before Lord Keeper *Finch*, in the presence of *Wild* and *Twisden*; and the two Judges held, that *B.* should not receive the profits of the manor after the first incumbrance was satisfied, because he had taken the rectory only for his security of that sum; and it would be unreasonable to give him a security beyond what he had in his original intention. But the Lord Keeper overruled it; for that, when he had purchased the precedent incumbrances, which comprehended both the manor and the rectory, and were forfeited at law, it was but reasonable that the estate should not be taken away by the mesne incumbrancer in a court of equity, which by no methods could

could be evicted at law, unless the person who sought relief would do equity, and pay the whole money due on both securities.

§ 35. It has been long since established as a rule in Chancery, that where a mortgagee buys in incumbrances to protect his estate at law, on compositions, he shall be allowed the full money due on such incumbrances; and the same shall not be redeemed by the mortgagor or his heir, without full payment of all the money due on such incumbrances, without regard to the beneficial bargains and compositions made by such purchaser.

Ascough v. Johnson,
1 Vern. 66.

§ 36. A distinction is, however, made in cases of this kind, between a stranger and a trustee or heir at law. For where an heir or trustee buys in an incumbrance, he shall be allowed no more than what he really paid for it, unless he bought it to protect an incumbrance to which he himself was entitled. But where a stranger who has an incumbrance on an estate, buys in another security to protect his own, he shall not only hold it till he has satisfied his own debt, and has reimbursed himself the money paid for the incumbrance he bought in, but even till he has received all the money and arrears of interest due on the security so bought in.

Darcy v. Hall,
1 Vern. 49.
Id. 335:
2 Atk. 54.

§ 37. In the case of judgments or statutes, it is laid down by Sir *Joseph Jekyll*, that if a puisne mortgagee, without notice, buys in a prior judgment or statute, and that judgment or statute is extended upon an elegit, at a value much under the real, the mesne mortgagee shall not make the puisne mortgagee, who has got in

2 P. Wms.
494.

such judgment, account otherwise or for more than the extended value; nor will the Court of Chancery give any relief against the judgment or statute, but leave the mesne mortgagee to get rid of them as well as he can at law.

A first Mortgagee may tack a Judgment.

2 P. Wms.
4 + 2 \ cf.
K 662.
2 Atk. 352.

Id.

§ 38. It is laid down by Sir *Joseph Jekyll*, that where a first mortgagee advances a farther sum of money to the mortgagor upon a statute or judgment, he shall retain against a mesne mortgagee, till both the mortgage and statute or judgment be paid; because it is to be presumed, that he lent his money upon the statute or judgment, as knowing he had hold of the land by the mortgage, and, in confidence, ventured a farther sum on a security, which, though it passed no present interest in the land, yet must be admitted to be a lien thereon. But this is only allowed where the first mortgagee lent the money on the judgment, before he had notice of the subsequent incumbrance.

Godfrey v. Watson,
3 Atk. 517.

§ 39. Where a mortgagee has tacked a judgment to his mortgage, he shall not be confined to the penalty of the judgment, but shall be entitled to interest upon the debt secured by judgment, though it exceeds the penalty down to the time the principal is paid off.

But a Judgment Creditor cannot tack.

Vide *Wright v. Pilling*,
Prec. in Cha.
494.
Contra.

§ 40. A creditor by judgment, statute, or recognition, cannot, by buying in an old mortgage, tack it to his judgment, &c. so as thereby to gain a preference to his judgment over a subsequent mortgage; because a judgment creditor does not advance his money upon the credit of the cognizor's real estate.

§ 44. A puisne

§ 41. A puisne judgment creditor bought in the first mortgage, without notice of the second mortgage, when he lent his money on the judgment. And the question was, whether this puisne judgment creditor should tack and unite his judgment to the first mortgage, so as to gain a preference on his judgment before the mesne mortgage.

Brace v.
Duchess of
Marlborough,
2 P. Wms.
491.

Sir Joseph Jekyll held, that the judgment creditor should not tack or unite the first mortgage to his judgment, and thereby gain a preference. For one cannot call a judgment creditor a purchaser, nor has such creditor any right to the land: he has neither *jus in re*, nor *ad rem*; and, therefore, though he releases all his right to the land, he may extend it afterwards. All that he has by the judgment, is a lien on the land, but *non constat*, whether he ever will make use thereof; for he may recover the debt out of the goods of the cognizor by *fieri facias*, or may take the body, and then, during the defendant's life, he can have no other execution: besides, the judgment creditor does not lend his money upon the immediate view or contemplation of the cognizor's real estate, for the land afterwards purchased, may be extended upon a judgment; nor is he deceived or defrauded, though the cognizor of the judgment had before made twenty mortgages of all his real estate, whereas a mortgagee is defrauded or deceived if the mortgagor, before that time, mortgaged his land to another; and it is such a fraud as the Parliament takes notice of, and punishes by foreclosing such mortgagor, who mortgages his land a second time, without giving notice of the first mortgage: and, in

Ante, ch. 2

that respect, this case differed from a puisne mortgagee's buying in the first mortgage. His Honor further observed, that though the rule of equity had been so settled, it was not, however, without great appearance of hardship; for still it seemed reasonable, that each mortgagee should be paid according to his priority, and hard to leave a second mortgagee without remedy, who might know, when he lent his money, that the land was of sufficient value to pay the first mortgage, and also his own, to be defeated of a just debt by a matter *inter alios acta*, a contrivance between the first mortgagee and the third, was great severity: but this had been settled upon solemn debate in the case of *Marsh v. Lee*, wherein that great man Sir Matthew Hale, (then Chief Baron), was called by the Lord Chancellor to his assistance.

Ante.

A Term assigned to attend, &c. may be got in by an Incumbrancer.

Tit. 12. c. 3.

§ 42. The nature of outstanding terms, and the distinction between terms in gross and terms attendant on the inheritance, has been already explained. And in a modern case it has been determined, that although a term has been assigned upon an express trust to attend the inheritance; yet if a subsequent incumbrancer gets an assignment of such a term to a trustee for himself, it will protect him against all mesne incumbrances, in the same manner as if it had been a term in gross.

Willoughby
v.
Willoughby,
1 Term. R.
763.

§ 43. *George Willoughby*, the plaintiff *Jane's* husband, being seised in fee, subject to a mortgage term for years, 12th November 1718, in consideration of and previous to his marriage with the plaintiff, entered into articles for settling the estate to the use of himself
for

for life, then for securing a jointure to the plaintiff, *Jane*, of 350 *l. per annum*, remainder to the first and other sons of the marriage in tail male, remainder to *George Willoughby* in fee, with power to charge the premises by deed or will with 3000 *l.* for younger children's portions. A settlement was made 24th *March* 1719, in pursuance of the articles, and 17th *August* 1718, the old term was assigned to *Skylling* and *Popham*, upon an express trust declared for *George Willoughby*, his heirs and assigns, to attend and wait upon the freehold and inheritance of the premises, and be subservient thereto. *George Willoughby*, 24th *March* 1750, made his will, and executed his power by charging his estate with 3000 *l.* for his younger children, and died, leaving the plaintiff *Jane* his widow, the defendant *Henry Willoughby* his eldest son, and three daughters, and a younger son *George*, co-plaintiffs with the mother. The plaintiff *Jane* being entitled under the settlement to her jointure of 350 *l. per annum*, and *Henry* being tenant in tail, he suffered a recovery, declaring the use to trustees and their heirs, upon trust nevertheless for such person and persons, and such estate and estates, as he the said *Henry Willoughby* by deed should appoint; and borrowed 870 *l.* of his mother, and by an assignment mortgaged the estate to her for a term of 500 years. All this time the old term remained, and stood in *Skylling* and *Popham*; but 15th *June* 1752, *Henry* borrowed 800 *l.* of the defendant *Jeffrey Cripps*, and for securing it, mortgaged the premises to *Cripps* in fee. The same day, *Skylling*, the surviving trustee in the assignment of the old term to attend the inheritance, by the direction of defendant *Henry*,

Henry, assigned that term to the defendant *Alexander Boote*, in trust to protect *Cripps's* mortgage of the fee. It appeared by evidence, that previous to the taking of this mortgage, and on that occasion, *Cripps* had full notice of the marriage articles, notwithstanding which he took a covenant in the mortgage deed from *Henry Willoughby* that the premises were free from all incumbrances, except one indenture of assignment of the old term to the defendant *Boote*, and the said term and the mesne assignment thereof in the said last assignment mentioned; but it did not appear that *Cripps* had any notice of the mortgage made by *Henry* to the plaintiff his mother. The plaintiff, *Jane*, the mother, together with her daughters and younger son, brought a bill to have the benefit of her jointure under the marriage settlement, and to have a sale of the estate, subject to her 350*l.* *per annum*; and out of the money arising from the sale, to be paid the arrears of her jointure, next the provision for her daughters and younger son, and then her mortgage of 870*l.*, and the other incumbrances in their order.

The defendant *Cripps*, the puisne mortgagee, submitted, that the plaintiff *Jane's* jointure, and the younger children's portions should be preferred: but insisted that his mortgage ought to be preferred to the plaintiff *Jane's* mortgage, the legal estate of the prior term being vested in the defendant *Boote*, his trustee, and he being a purchaser by his second mortgage without notice of the first; on this principle, that the legal estate of the term being in a trustee for him, he had
both

both law and equity on his side, while the plaintiff *Jane* had only an equity as against the term.

This cause had depended some time, and now the judgment was given.

“ Two questions have been argued at the bar :
 “ 1st, A *general* question, whether this term having
 “ been assigned for *Skylling* and *Popham* upon an ex-
 “ press trust declared to attend upon the freehold and
 “ inheritance, and be subservient thereto, the defend-
 “ ant *Cripps* could in equity have had the benefit of
 “ it, to protect his mortgage, both against the jointure,
 “ the younger children’s portions, and the prior
 “ mortgage, even supposing he had no notice of any
 “ of them.

“ 2dly, A particular question, whether the defend-
 “ ant *Cripps*, having full notice of the marriage settle-
 “ ment, the jointure, and portion, and consequently
 “ not being entitled to the entire absolute benefit of
 “ the legal estate of the old term, can be preferred to
 “ the plaintiff, Mrs. *Willoughby*, even as to her mort-
 “ gage, or must come in only according to his priority
 “ in order of time.”

The first question depends upon three considerations:
 1st, “ What is the nature of a term attendant upon
 “ the inheritance? 2dly, What kind of grantee or
 “ owner of the inheritance is entitled to the protection
 “ of such a term, or, in other words, in whose hands
 “ such a term shall be allowed to protect the inher-
 “ itance?

“ ance? 3dly, Against what estates, charges or in-
 “ cumbrances the protection arising from such a term
 “ shall extend?”

What Lord *Hardwicke* said respecting the first of these points, has been already stated under Title 12. *Trust*. ch. iii. §. 6.; I shall therefore only state the subsequent part of this excellent judgment.

“ 2dly, What kind of grantee or owner of the in-
 “ heritance is entitled, in this court, to the protec-
 “ tion of such a term? In the first place, he must be
 “ a purchaser for a price paid, or for a valuable con-
 “ sideration. He must be a purchaser *bonâ fide*, not
 “ affected with any fraud or collusion. He must be
 “ a purchaser without notice of the prior conveyance,
 “ or of the prior charge or incumbrance; for notice
 “ makes him come in fraudulently. And here, when
 “ I speak of a purchaser for a valuable consideration,
 “ I include a mortgagee, for he is a purchaser *pro*
 “ *tantq.* If he has no notice, and happens to take a
 “ defective conveyance of the inheritance, defective
 “ either by reason of some prior conveyance, or of
 “ some prior charge or incumbrance; and if he also
 “ take an assignment of the term to a trustee for him,
 “ or to himself, where he takes the conveyance of the
 “ inheritance to his trustee, in both these cases, he shall
 “ have the benefit of the term to protect him; that is,
 “ he may make use of the legal estate of the term to
 “ defend his possession, or, if he has lost the posses-
 “ sion, to recover it at common law, notwithstanding
 “ that his adversary may at law have the strict title
 “ to

“ to the inheritance. This made me say, that, in those
 “ cases, the court often disannexes the trust of the
 “ term from the strict legal fee, but still in support of
 “ right. For if a man come in fairly and *bonâ fide*,
 “ and has paid a price for the land, and has acquired
 “ an estate in it, which the law will support, (a plank by
 “ which at law he may save himself from sinking), there
 “ can be no ground in equity or conscience to take it
 “ from him. This is the meaning of what is generally
 “ expressed by saying, that where a man has both law
 “ and equity on his side, he shall not be hurt in a
 “ court of equity. It was once doubted whether, if
 “ the term were vested in a third person, a trustee
 “ generally, and not in the party himself, he should be
 “ allowed the benefit of it in equity, because the court
 “ ought to determine for whom the stranger was a
 “ trustee; and then the rule is, *qui prior est tempore*,
 “ *potior est jure*. But this was settled by Lord Cowper,
 “ in the case of *Wilker v. Bodington*, 2 Vern. 599. He
 “ lays it down to be a rule in equity, that where a man
 “ is a purchaser for a valuable consideration, without
 “ notice, he shall not be annoyed in equity, not only
 “ where he has a prior legal estate, but *where he has*
 “ *a better right to call for the legal estate than his ad-*
 “ *versary*. And, for this reason, his Lordship dis-
 “ missed the bill. But here I desire it may be ob-
 “ served, that he must have the better right to call for
 “ an assignment of the legal estate, for the sake of the
 “ use I shall make of it afterwards.

“ 3dly, The third consideration is, against what
 “ estates, charges, or incumbrances, the protection
 “ arising

arising from such a term shall extend? The answer
 to this question may, I think, be laid down very gene-
 rally, against all estates, charges, and incumbran-
 ces, created intermediate between the raising of the
 term and the purchase. But here I desire to be
 understood, to take in all the qualities and requisites
 before laid down; valuable consideration, *bona fides*,
 and entire fairness in the purchase, freedom from
 notice, either express or implied, and the having of
 the first and best right to call for the legal estate of
 the term. All these must concur to warrant this
 protection. And here arises the distinction, where-
 upon great stress was laid for the plaintiff in this
 cause, and which was much laboured: 1st, It was
 admitted that this will be so, where the old term is
 standing out in the original mortgagee or grantee of
 it, or his representatives, and has never been assign-
 ed to attend the inheritance; but that, where it has
 been so assigned upon an express trust, it shall at-
 tend the first limitations of the inheritance, and all
 the estates derived out of it; it shall protect them,
 as here the uses of the marriage settlement, and the
 subsequent purchaser without notice, can no ways
 gain the benefit of it. 2dly, That where it is so
 assigned, upon an express trust to attend the inheri-
 tance, it is become so annexed to that inheritance,
 that it cannot be severed from it. But the argument
 is not well founded. It is an attempt to establish a
 new distinction between a term attendant upon the
 inheritance, by express declaration of the trust, and
 a term so attendant by construction or judgment of
 a court of equity. No authority or precedent of
 this

“ this court has been cited to warrant this distinction ;
 “ and the only case where any thing of that nature
 “ appears, is to the contrary ; I mean that of *Oxwick*
 “ v. *Brocket*, 1 *Ab. Eq.* 355. How authentic that re-
 “ port is I cannot take upon me to say, for the decree
 “ is not entered in the register’s book, and the minutes
 “ are so imperfect, that nothing material can be col-
 “ lected from them, except that there was an assign-
 “ ment of a mortgage term to attend the inheritance
 “ in the case. Let us then examine the grounds of
 “ this difference.

“ If, It was urged, that where a term appears to
 “ be assigned expressly to attend the inheritance, it is
 “ notice to a purchaser or mortgagee that there are
 “ some limitations of the inheritance to be protected
 “ by it ; and if so, the purchaser or mortgagee takes
 “ his assignment of it with notice. But I take this to
 “ be a mistake. It is notice of nothing, but that there
 “ is an inheritance to be protected, and that the term
 “ is attendant. And it does by no means imply that
 “ the inheritance is settled or bound by special limita-
 “ tions ; for a satisfied term may be, and often is,
 “ assigned to attend an inheritance in fee-simple, as
 “ well as a fee tail, or an estate carved out by par-
 “ ticular uses and limitations. It therefore gives no-
 “ tice to a purchaser of nothing, but what he had
 “ notice of by the deeds making out the title to the
 “ fee. In this respect it is just the same as where the
 “ trust to attend the inheritance is constructive or im-
 “ plied. Indeed if the trust be declared to attend the
 “ freehold and inheritance, as limited or settled by

“ such a deed, or to protect the uses of such a settle-
 “ ment, as is sometimes done, that will be notice of
 “ the deed or settlement, and consequently of all the
 “ uses of it ; and the purchaser is bound to find them
 “ out at his peril. And I look upon this to have been
 “ the ground of the mistake.

“ 2dly, It was argued, that a term expressly af-
 “ signed to attend the inheritance, is so connected
 “ with it, that it will go along with all the uses and
 “ interests devised out of that inheritance for a valu-
 “ able consideration. That where a new conveyance
 “ is made of it for a valuable consideration, the trust
 “ of the term will immediately follow it, and the trust-
 “ ees will become a trustee for the new use. That so
 “ it was here upon the first mortgage made to the
 “ plaintiff Mrs. *Willoughby* by the defendant her son,
 “ and the surviving trustee, *Skylling*, could not alter the
 “ trust. I agree that it will be so against the grantor
 “ in that new conveyance of the inheritance, and his
 “ heirs, and all persons claiming from him as volun-
 “ teers, or with notice. So it is in all cases where
 “ the owner creates a new estate, use, or incumbrance
 “ out of the inheritance, or a charge upon it, con-
 “ fesses a judgment, or a statute staple, &c. The
 “ trust of an attendant term is affected with it, in like
 “ manner as the inheritance is, as against the grantor
 “ and his heirs ; and the purchaser or incumbrancer
 “ will receive the benefit of it in this court. But
 “ when a new purchaser for a valuable consideration
 “ comes in without notice, and with all the qualifica-
 “ tions which I have before mentioned, and gets an
 “ assignment

“ assignment of the term, he comes in, in a different
 “ degree; and, as he is innocent, and has paid or
 “ given the value, and has got the law with him, how
 “ can a court of equity take it from him, without
 “ contradicting all their rules? This subsequent pur-
 “ chafer having no notice, stands, as against the prior
 “ purchaser or incumbrancer, but in the common
 “ case.

“ 3dly, It was objected farther, that this is to sever
 “ the trust of the term from the inheritance, and to
 “ leave the title of the inheritance to go one way, and
 “ the trust of the term another way. That this was
 “ not in the power of the owner of the inheritance
 “ after his first conveyance, nor of the trustee, nor of
 “ both joining together. It is not necessary, here, to
 “ enter into the discussion of all the cases wherein a
 “ term, once attendant upon the inheritance, may be
 “ disannexed, and be turned into a term in gross. It
 “ is certain that it may be done at any time by the ab-
 “ solute owner of the inheritance; and so it is admit-
 “ ted by Serjeant *Maynard*, in his argument of the
 “ Duke of *Norfolk's* case; or it may be made to be-
 “ come a term in gross upon a contingency, accord-
 “ ing to the resolution in that case. But here is no
 “ question of severing or disannexing; for the defen-
 “ dant *Cripps*, the second mortgagee of the fee, claims
 “ the term as attendant upon the inheritance, in him.
 “ In this court, had he come in without notice, he
 “ must be considered as a purchaser of it, *pro tanto*,
 “ by his mortgage. He contracted for the security of
 “ the inheritance, and paid his money for it; and,

“ though he had the misfortune, ignorantly and in-
 “ nocently, to take a defective title to that inheritance,
 “ still it is the thing he bought, and desires to protect.
 “ If this were otherwise, he would prevent every puisne
 “ mortgagee or purchaser, who has got an assignment
 “ of an attendant term, from making use of it in his
 “ defence. The argument was enforced by saying,
 “ that it will put it in the power of a trustee of such
 “ an attendant term, to prefer which of several incum-
 “ brances he pleases, by assigning it over; and that
 “ this he can no more do, than a trustee, to preserve
 “ contingent remainders, can be allowed in this court
 “ to join to destroy them. But this reasoning answers
 “ itself; for I take it to be just upon the same foot as
 “ the case of a trustee to preserve contingent remain-
 “ ders. If such a trustee join in a conveyance to a
 “ purchaser for a valuable consideration, and the pur-
 “ chaser has notice of that trust, the latter is affected
 “ with the trust, and shall be decreed to reconvey the
 “ estate to the old uses. But if the purchaser comes in
 “ *bond fide*, and has no notice, he shall retain the
 “ estate: but the trustee shall make satisfaction for his
 “ breach of trust, in destroying the contingent re-
 “ mainder. It is just the same here, if the puisne
 “ purchaser or mortgagee has notice of the prior pur-
 “ chase or incumbrance, he shall not avail himself of
 “ the assignment of the term, but shall be decreed to
 “ reconvey, or procure it to be reconveyed. If he
 “ had no notice, he must retain it; but, if the trust-
 “ tee, who joined in the assignment, had notice of
 “ such prior purchase or incumbrance, his conscience
 “ was affected by the trust; it was a breach of trust
 “ in

“ in him ; and he ought to be decreed to make satisfac-
 “ tion. This, in my opinion, is what equity would
 “ demand.

“ To go a step farther.—See to what an extent this
 “ doctrine, would go, if it were once admitted. It
 “ would make the assignment of such an attendant
 “ term to a purchaser’s own trustees named on his
 “ behalf, to protect him against nothing. The trust
 “ arising from the attendancy, is to protect against
 “ mesne incumbrances, that is to say, mesne between the
 “ creation of the term and the assignment of it, or the
 “ use that is made of it. But if it be allowed, that
 “ wherever there is a conveyance made, or a charge
 “ or incumbrance created upon the inheritance for a
 “ valuable consideration, that draws after it so much
 “ of the trust of the term, (as it really does), and
 “ that therefore a puisne purchaser or mortgagee,
 “ without notice, taking an assignment of it, takes it
 “ still bound by the derivative trust, such puisne pur-
 “ chaser or mortgagee can never be safe. And whe-
 “ ther he had notice or not, is nothing to the pur-
 “ pose ; for, by this doctrine, it is still open to all the
 “ prior incumbrances, in the one case as well as in
 “ the other.

“ There is but one thing behind which deserves
 “ taking notice of under this head. It was said to have
 “ been the general rule amongst conveyancers, mak-
 “ ing marriage settlements or conveyances upon pur-
 “ chases, where they found an old term assigned upon
 “ an express trust to attend the inheritance, not to dis-

“ turb it, or to take any new assignment of it to
 “ trustees named by the purchaser, but rely upon it as
 “ it is. I have enquired of a very learned and emi-
 “ nent conveyancer, Mr. *Filmer*, and cannot find there
 “ has been any such *general rule*. If there had, I con-
 “ fess it would have been very material, as in my Lady
 “ *Radnor’s* case. It is true, that Mr. *John Ward* of
 “ the Temple, who was considerable in that branch of
 “ business, has declared it to be his opinion, and he
 “ took it to be so; but how far he practised so *non*
 “ *constat*, and if he did, it would not make it a gene-
 “ ral rule, which is the point to be enquired after.
 “ To reduce it to reason, it must be taken with a di-
 “ stinction. Where an old term has been assigned,
 “ upon an express trust to attend upon and protect the
 “ inheritance, *as settled by such a deed, or the uses of*
 “ *such a settlement described or referred to particularly,*
 “ as it sometimes happens, and the conveyancer is
 “ satisfied, that those uses of the inheritance have never
 “ been barred till his new settlement or purchase is
 “ made, he may very safely rely upon it; because the
 “ very assignment carries notice of the old uses. Nay,
 “ where the assignment has been, generally, in trust
 “ to attend the inheritance, and the parties approve of
 “ the old trustees, they may safely rely upon it, espe-
 “ cially in the case of a purchaser or mortgagee, where
 “ the title deeds always are or ought to be taken in;
 “ for if he has the creation and the assignment of the
 “ term in his own hands, no use can be made of it
 “ against him: such instances as these may account
 “ for the practice in many cases, but cannot constitute
 “ a *general rule*.

“ Much

“ Much was said under the head of inconvenience,
 “ danger to marriage settlements, and to prior pur-
 “ chases fairly made. But the inconvenience which
 “ would arise, on the other hand, of breaking in upon
 “ the rule, *that a purchaser for a valuable consideration,*
 “ *without notice, shall not be hurt in equity; or that a*
 “ *court of equity shall not take away the benefit of the law*
 “ *from him,* will balance all those arguments, and be
 “ found to outweigh them. This rule of equity bears
 “ an analogy and conformity to several rules of com-
 “ mon law, relating to collateral warranties, non-
 “ claims, and descents, which are only the wise inven-
 “ tions and decisions of the law to quiet and protect
 “ possessions. From this reasoning, I am clearly of
 “ opinion upon the first point, that the defendant
 “ *Cripps*, the puisne mortgagee, would have been en-
 “ titled in a court of equity to the benefit of this trust
 “ term to protect his mortgage, both against the mar-
 “ riage settlement and the plaintiff’s first mortgage, in
 “ case he had no farther notice of either.”

§ 44. It was held, in a modern case, that a second mortgagee, without notice of the first mortgage, who had taken an assignment of a term which was attendant on the inheritance, and had got all the title deeds, should recover in ejectment against the first mortgagee.

§ 45. *Jones*, seised in fee of several estates, demised the same, in 1761, to *Aubrey*, for 999 years, by way of mortgage. Afterwards, in 1768, this term was assigned to *Lockwood*, in trust for *Jones*, as to part of

Goodtitle v. Morgan,
 1 Term. R.
 755.

the lands, and, in the mean time, to attend the inheritance. In 1767, *Jones* mortgaged to *Morgan*, and, in July 1769, to *David*. Both these mortgages were in fee. In December 1769, *Jones* and *Lockwood* assigned the last mentioned lands to *Moreland*, his executors, &c. for the remainder of the term of 999 years, in trust for *Sprigg*, for securing 10,000 *l.* lent by *Sprigg* to *Jones*. Afterwards, *Jones*, by indentures of lease and release, mortgaged the same estates in fee to *Sprigg*, for securing the 10,000 *l.* On the mortgage to *Sprigg*, all proper searches were made on his part for incumbrances, and he had all the title deeds that could be found delivered to him at the time he advanced his money, except the demise of the term for 999 years, and the assignments of it, which were kept in the hands of *Lockwood*, on account only of containing other premises in mortgage to *Lockwood*, and which were not included in the mortgage to *Sprigg*, nor assigned to *Moreland* his trustee; but counterparts of them were then delivered to *Sprigg*. On these facts, the question in an ejectment was, whether *Morgan* and *David*, or *Sprigg*, should be preferred.

On the part of *Morgan* and *David* it was contended, that this term must be considered as attendant on the inheritance; and consequently at the times of the respective mortgages to them, the trustee of the term became their trustee, and the term could not be separated from the inheritance but by their consent. That if, previous to the conveyance to *Sprigg* in 1769, *Morgan* and *David* had brought ejectments upon their mortgages, neither *Jones*, nor *Lockwood* his trustee, could
have

have set up his term as a bar to their ejectments: then if *Jones* himself could not set up the term, it was absurd to say that those who claimed under him might; for they could not claim a greater estate than he had. Then *Jones*, having parted with the inheritance, had no power afterwards to make any appointment of it differently—His power was gone, though it were collateral, by the conveyance of the land. *Sed per Ashurst* Justice, no man ought to be so absurd as to make a purchase without looking at the title deeds; if he is, he must take the consequence of his own negligence. If the first mortgagee had an ordinary precaution, he must have known that this term was then outstanding. And if he did know it, and neglected to take an assignment of it, it was enabling the mortgagor to commit a fraud, by mortgaging the same estate again. By this, therefore, he became *particeps criminis*, and he must suffer the consequences of the fraud; and *Sprigg*, who has got the legal estate must be preferred.

§ 46. A declaration of trust of a term of years in favour of an incumbrancer, is tantamount to an actual assignment, unless a subsequent incumbrancer *bona fide*, and without notice, procures an assignment. And the custody of the deeds respecting a term for years, with a declaration of trust of it, in favour of a second incumbrancer, is equivalent to an actual assignment.

§ 47. *Henry Sayer*, being seised in fee of certain estates, subject to an outstanding term of years in *Rigby* and *Eyre*, by indentures of lease and release,

Stanhope v. Verney,
1 Inst. 290 b.
n. f. 13.

bearing date the 4th and 5th days of *June* 1732, conveyed them to Lady *Dysart* and her heirs, for securing the payment of 1000 *l.* and interest, and covenanted to produce the deeds respecting the terms of years. Afterwards, *Rigby* and *Eyre* assigned the term to *Cunningham* and *Clayton*, in trust for *Sayer*, his heirs and assigns; and then *Sayer*, by indenture dated the 19th day of *December* 1732, conveyed the same estates to Mrs. *Nash*, (under whom Lord *Verney* claimed), by way of mortgage, for securing to her 3000 *l.* and interest, with a declaration that *Cunningham* and *Clayton* should stand possessed of the term in trust for her; and the deeds respecting it were delivered to her, and neither she nor the trustees had notice of the mortgage to Lady *Dysart*. Lady *Dysart* brought an ejectment; Lord *Verney* defended, and set up the term, with a declaration of the trust of it in favour of Mrs. *Nash*, under whom he claimed. Upon this, Lady *Dysart* brought her bill in equity.

The question was, which should be preferred: Lady *Dysart*, who had the first declaration of the trust of the term; or Lord *Verney*, who had the subsequent declaration of the trust, with the custody of the deed?

Lord *Northington* held, that a declaration of the trust, in favour of an incumbrancer, was tantamount to an actual assignment, unless a subsequent incumbrancer *bonâ fide*, and without notice, procured an assignment; and that the custody of the deeds respecting the term, with a declaration of the trust of it in
favour

favour of a second incumbrancer, was *equivalent to an actual* assignment; and therefore gave him an advantage over the first incumbrancer, which equity would not take from him.

§ 48. It has been stated in a former title, that there are some cases in which a court of law will not allow a satisfied term of years, vested in a third person, to be set up as a bar to a plaintiff in ejectment. If this rule was generally established, a second or third mortgagee, who had got an old satisfied term, could not by that means prevent the first mortgagee from obtaining possession of the estate. And therefore in a modern case, Lord *Loughborough* has justly said, “Titles to property
“ may possibly be found to be very considerably shaken
“ by the doctrine of the Court of King’s Bench as to
“ satisfied terms. The law, as to that, here is, that a
“ second mortgagee, having no notice of the first
“ mortgage, if he can get in a satisfied term, would
“ do that which is the true ground of the decision,
“ though it is not put upon that by Mr. Justice *Buller* :
“ he would, as in conscience he might, get the legal
“ estate; and, by virtue of that, protect his estate
“ against the first mortgagee, having got a prior title,
“ the conscience being equal between the parties.
“ When once it is said at law, that a satisfied term
“ should not be set up in ejectment, the whole security
“ of that title is destroyed; and therefore even with
“ the modern correction that doctrine has received in
“ the late cases, which is that you may set up the term
“ though satisfied, and put it as a question to the jury
“ whether an assignment is to be presumed, it seems

This Doctrine weakened by some Determinations at Law.

Tit. 12. ch. 3.

6 Ves. jun. 184.

“ to

“ to me very dangerous between purchasers; and the
 “ leaning of the court ought to be that it was not
 “ assigned. And I fully concur with Lord *Kenyon*,
 “ that it is not fit for a judge to tell a jury they are to
 “ presume a term assigned, because it is satisfied; but
 “ there ought to be some dealing upon it, or you take
 “ from a purchaser the effect of his diligence in having
 “ got in the legal estate, to the benefit of which he is
 “ entitled.”

The puisne
 Mortgagee
 must have the
 best Right
 to the legal
 Estate.

§ 49. Unless a person has a clear *bona fides*, and the first and best right to call for the legal estate, a court of equity will not give him a priority over a preceding incumbrancer; but he must come in according to the order of time.

Ante.

§ 50. In the case of *Willoughby v. Willoughby*, the defendant *Cripps* claimed a priority over the plaintiff Mrs. *Willoughby*, in consequence of the assignment of the term to *Boote*, in trust to protect *Cripps*'s mortgage.

Lord *Hardwicke*, as to this point, is reported to have said—“ The second question is a particular one, and
 “ arises upon the special circumstances of this case:
 “ whether the defendant *Cripps*, having full notice of
 “ the marriage settlement, the jointure, and the por-
 “ tions, and consequently not being entitled to the
 “ entire absolute benefit of the legal estate of the old
 “ term, can be preferred to the plaintiff Mrs. *Willoughby*
 “ even as to her mortgage, or must come in only ac-
 “ cording to his priority in order of time? Upon this
 point,

“ point, I am of opinion that he must come in only
 “ according to his priority in order of time. My
 “ reasons are two :—

“ First, he has not the legal estate of the term in
 “ himself; nor has he, as this case is circumstanced,
 “ the best or preferable right to call for that legal
 “ estate. Secondly, I cannot say that he took his
 “ mortgage clearly *bond fide* in this case.

“ Consider how the right would have stood as be-
 “ tween the plaintiff Mrs. *Willoughby*'s mortgage, and
 “ the defendant *Cripps*'s mortgage, in case there had
 “ been no assignment of the old term to a new trustee
 “ for *Cripps*; but the legal estate had remained in
 “ *Skylling*, the surviving trustee in the first assignment
 “ to attend the inheritance. In that case, it would
 “ have been most plain, that Mrs. *Willoughby*'s mort-
 “ gage should have been preferred. Wherever the
 “ legal estate is standing out, either in a prior incum-
 “ brance, or in such a trustee as against whom the
 “ puisne incumbrancer has not the best right to call for
 “ the legal estate, the whole title and consideration is
 “ in equity, and then the general maxim must take
 “ place, *qui prior est tempore potior est jure*. And this
 “ is the last point expressly determined by Sir *Joseph*
 “ *Jekyll*, in the case of *Brace* and the Duchess of
 “ *Marlborough*, 2 P. Wms. 495. His words are, “ In
 “ this case, it appears, that a puisne incumbrancer
 “ bought in a prior mortgage, in order to unite the
 “ same to the puisne incumbrancer; but it being proved
 “ that

“ that there was a mortgage prior to that, the court
 “ clearly held, that the puisne incumbrancer, *where*
 “ *he had gotten a legal estate*, or where the legal estate
 “ was vested in a trustee, could then make no advan-
 “ tage of his mortgage ; but *in all cases where the legal*
 “ *estate is standing out*, the several incumbrances must
 “ be paid according to their priority.” Those
 “ words, “ *in all cases where the legal estate is standing*
 “ *out*,” must be understood subject to my Lord Cow-
 “ per’s qualification and distinction, so standing out,
 “ as that the puisne incumbrancer has not acquired the
 “ better or preferable right to call for that legal estate.
 “ Now, this he has plainly not done here ; for the
 “ defendant *Cripps*, having full notice of the *marriage*
 “ *settlement* before he took his mortgage, the plaintiff,
 “ Mrs. *Willoughby*, has the better and preferable right,
 “ even as against the defendant *Alexander Boote*, the
 “ new trustee, to call for the legal estate of the old
 “ term to protect her jointure. She might, *upon*
 “ *equitable grounds*, demand it to be assigned to a new
 “ trustee for her ; and, when that was done, I think
 “ she might protect her mortgage by it. This brings
 “ the whole to be within equity, and subjects the case
 “ to the rule, *qui prior est tempore potior est jure*. She
 “ might come for an injunction to restrain *Boote* from
 “ recovering the possession from her by ejectment, and
 “ compel the defendant *Cripps* to redeem her in respect
 “ of the arrears of her annuity, and then he must re-
 “ deem her entirely. This is not so strong as the case
 “ of tacking a third incumbrance to a first, in order
 “ to squeeze out a second, because it goes only in
 “ support

“ support and preservation of the plaintiff’s actual
 “ priority, her original, prior, equitable right, which
 “ she acquired by having the first mortgage.

“ But I think this point is materially corroborated
 “ against the defendant by my second reason, which
 “ is, that he did not take his mortgage clearly *bond*
 “ *fide* in this case. It appears plainly to me, that he
 “ aimed at gaining an unfair advantage, in the man-
 “ ner of taking his security. He had full notice of
 “ the marriage settlement, the jointure of 350 *l. per*
 “ *annum*, and the younger children’s portions. He
 “ knew all these to be prior incumbrances on the
 “ estate, and yet, in contradiction to this, and with
 “ his eyes open, he took an express covenant in his
 “ mortgage deed, *that the premises were free from all*
 “ *incumbrances, except an indenture of assignment of the*
 “ *whole term to the defendant Boote, and the said term*
 “ *and the mesne assignments thereof in the said last as-*
 “ *signment mentioned.* This was plainly intended to
 “ conceal that *full notice* which he had of the marriage
 “ settlement, and, in consequence thereof, he has not
 “ admitted *that notice* by his answer in this cause, but
 “ has put the plaintiff upon the proof of it; and now
 “ it comes out by the proofs in this strong light, that
 “ it appears to have been fully stated in the case laid
 “ before his own counsel previous to the lending of
 “ his money. This is against conscience, and is a
 “ badge of an indirect and collusive intention.

“ For these reasons, I am of opinion, that the de-
 “ fendant *Cripps* wants, and stands divested of, two
 “ ingredients

“ ingredients necessary to entitle himself in equity to
 “ the protection of this whole term against the plain-
 “ tiff, that is to say, a clear *bona fides*, and *the first*
 “ *and best right to call for the legal estate*; and, there-
 “ fore, that he can come in only according to the
 “ order of time, which is posterior to the jointure,
 “ the portions, and plaintiff’s mortgage.

“ Decreed, that proper accounts be taken of prin-
 “ cipal and interest, a sale of the estate, and applica-
 “ tion of the money arising by sale, and the mortgage
 “ to the plaintiff the widow, be, according to its
 “ priority, preferred to the mortgage to the defendant
 “ *Cripps*.”

At what
Time a prior
Incumbrance
may be got
in.
Hawkins v.
Taylor and
Leigh,
2 Vern. 29.
Id. 81.
3 P. Wms.
494.

§ 51. With respect to the time when a third mort-
 gagee may purchase in a prior incumbrance, it has
 been long established that this may be done, *pendente*
lite; for it may happen that he first discovers that
 there are prior incumbrances by the proceedings in
 the cause.

§ 52. In a modern case, it was determined by the
 Court of Chancery, and the decree affirmed by the
 House of Lords, that a third or other subsequent mort-
 gagee, after a bill filed for sale of the estate and pay-
 ment of all the mortgages, to which he had put in an
 answer, and submitted, that the incumbrances might
 be discharged according to their respective priorities,
 might buy in the first mortgage, and thereby gain a
 priority over the second and other mortgagees.

§ 53. *John Butler*, being seised in fee of some lands in *Surry*, mortgaged them to five successive persons. Upon the death of the mortgagor, the second mortgagee filed a bill in the Court of Chancery against all the other mortgagees, praying that they might set forth their interest in the premises, and that the mortgaged premises might be sold, and the money be applied towards the payment of all the incumbrances, in their just order.

Belchier v. Renforth,
5 Bro Parl.
Ca. 292.

To this bill all the other mortgagees put in their answer; and the last mortgagee, by his answer, *submitted, that the premises might be sold, and the incumbrances discharged in their just order according to their respective priorities.* After all these answers had been put in, the last mortgagee purchased in the interest of the first mortgagee, and filed a cross bill, stating this matter; and that by means of the assignment from the first mortgagee, the legal estate in the premises was vested in him, and that therefore he was entitled to what was due on his own mortgage, preferably to any of the intervening mortgages. It was decreed, that the lands should be applied, first, in discharge of all that was due to the last mortgagee, as well on account of the *first mortgage*, which he had purchased, as on account of his *own mortgage*.

On an appeal to the House of Lords, it was contended, that this decree was wrong, for the following reasons: 1st, It is an established rule in equity, that as between incumbrancers having only equitable securities, that incumbrancer whose security is prior in point
of

of time, shall be preferred in payment.—*Qui prior est tempore potior est jure.* The reason is, that neither of them, having a legal title, there can be no ground for a court of equity to take from a prior incumbrancer, that right which the former was possessed of, before the latter became an incumbrancer. In this view, as matters stood at the commencement of the first cause, and when the same originally came on to be heard, the appellants were entitled to be paid in preference to the respondent.

2dly, Though in common and ordinary cases an incumbrancer who has the legal estate, shall be preferred in payment, to one who is only an equitable incumbrancer, and this not only where he originally took the legal security, but where a subsequent equitable incumbrancer has obtained an assignment of such legal security, and this even so far as to enable him to tack his equitable incumbrance to the prejudice of a former intervening incumbrancer. Yet this holds only where the conscience of the party is not affected by any circumstance of equity, nor his right restrained, qualified, or limited, so as to prevent his gaining such benefit of priority. In the present case, the defendant, by his answer, had *submitted to assign his legal security to the appellants, the plaintiffs in the cause, and that the estate should be sold, and all the incumbrances should be paid according to their respective priorities*; after which, he could not assign his securities to any subsequent incumbrancer, nor the respondent *Renforth*, who was party to the cause, and had notice of the said submission, to
take

take the same with a safe conscience to the prejudice of the plaintiff.

On the other side, it was argued, that the decree should be affirmed for the following reasons.

1st, For that it was an established rule in equity, that a third mortgagee having lent his money without knowing of there being a second mortgage upon the same estate, may, by paying off the first incumbrancer, and taking an assignment of his interest to himself, hold the estate against the second mortgagee, till he shall be paid what is due to him upon both the mortgages. That it was near a century since that doctrine was, upon long argument, and mature deliberation, first settled; and it had prevailed ever since without variation. So that a second mortgagee, when he lends his money upon an equity of redemption, knows (or what is the same thing, in questions of property, must be understood to know) that his security lies open to the hazard of a subsequent incumbrancer getting into his hands an assignment of the first mortgage, and being thereby postponed; and a subsequent incumbrancer, confiding in the notoriety and certainty of this rule, is induced to buy in the first incumbrance at a new expence.

2d, The principle upon which this doctrine was first established, and has ever since prevailed, is, that the third mortgagee having innocently lent his money, without knowing that the second had any claim upon

the estate, has in conscience as good a right to be paid the whole money he has lent, as the second mortgagee has to the payment of what he advanced; and having, by the assignment of the first, got a right to hold the estate absolutely at law, and having the possession of the title deeds, without which, the estate cannot be sold, a court of conscience ought not to take from him his legal protection of an honest debt. That, in this case, the justice of the rule was strengthened, because the second mortgagee did not make use of the common precaution in transactions of this nature, that of taking care that the title deeds, which were then in the hands of the mortgagor, were delivered to him; from which neglect, two things result, 1st, That he confided more in the integrity of the mortgagor, than in the real security of the mortgage; and, 2d, That he left in the hands of the mortgagor the means of trafficking with the estate again, and of deceiving innocent incumbrancers, who would be justified in presuming, that *he* who had the possession of the lands, and the custody of the title deeds, had a right to the estate.

This rule of equity looks no farther than to see, whether the third mortgagee had notice of the second mortgage *at the time when he first lent his money*, for it is then that he becomes an honest creditor, and has a right to protect his debt; but he has no occasion to look for a protection till he thinks himself in danger of being hurt; and, therefore, whether his danger is first discovered to him by the second mortgage being disclosed in a suit of equity, or by an extrajudicial

trajudicial means, as the honesty of the debt is not affected, his right of protecting it, and the efficacy of the protection, by buying in the first incumbrance, are not prejudiced; nor are they prejudiced by his having purchased the first incumbrance, after the incumbrancer had, in his answer to the appellant's bill, *submitted to a sale of the estate, and to an application of the money in discharging the incumbrances in their just order, and according to their priorities.* First, because the submission, taken in its full extent, can only bind the right of the person submitting, and not that of subsequent incumbrancers: but the right of protection claimed by the third mortgagee is not claimed, nor derived from the first, but arises from the present situation of the third mortgagee, as soon as he gets the legal interest in the estate, and attaches originally in himself: Secondly, the submission to a sale would not have that effect, though it had been made by the third mortgagee himself, much less when made by the first; for the rights of mortgagees are not altered by turning the mortgaged estate into money, since, in such cases, the court directs the money to be applied according to the rights of redemption; and, if the second mortgagee has not a right to redeem the estate without paying what is due upon the first and third mortgages, he will, of course, have no right to partake of the money till their claims are satisfied.

Robinson v. Davison,
1 Bro. Rep.
63. S. P.

The decree was affirmed.

§ 54. But where a puisne incumbrancer, after the bill brought, and after the first decree made, and after

Bristol v. Hungerford,
2 Vern. 524.

the report, got an assignment of an old judgment and mortgage, hoping, thereby, to gain a preference to his debt. *Per curiam*,—the assignment being after the decree made, he shall not profit by it, or change the order of payment, but must come in according to the time of his own incumbrance, without regard to the old judgment and mortgage which he got in after the decree and report.

Wortley v.
Birkhead,
2 Vel. 571.
3 Atk. 809.

§ 55. A person, after a decree had been made in a cause in which he had been a party with other creditors, and the master had been directed to inquire into the priority of their demands, bought in an old judgment, and made claim before the master to have it tacked to his mortgage, and thereby to gain a priority; as to which, the master refused to make any report, whereupon he filed his bill. And one question was, whether he could tack the incumbrance bought in after the decree to his mortgage?

2 Vel. 573.

Lord Hardwicke,—“ As to the equity of this court,
“ that a third incumbrancer, having taken his security
“ or mortgage without notice of the second incum-
“ brance, and then being *puisne* taking in the first
“ incumbrance, shall squeeze out and have satisfaction
“ before the second, that equity is certainly established
“ in general; and was so in *Marsh v. Lee*, by a very
“ solemn determination by Lord Hale, who gave it the
“ term of the creditors, *tabula in naufragio*:—that is
“ the leading case. Perhaps it might be going a good
“ way at first; but it has been followed ever since;
“ and I believe was rightly settled only on this foun-
“ dation,

“ dation, by the particular constitution of the law of
 “ this country. It could not happen in any other
 “ country but this ; because the jurisdiction of law
 “ and equity is administered here in different courts,
 “ and creates different kind of rights in estates ; and,
 “ therefore, as courts of equity break in upon the
 “ common law where necessity and conscience require
 “ it, still they allow superior force and strength to a
 “ legal title to estates ; and, therefore, where there is
 “ a legal title and equity of one side, this court never
 “ thought fit, that by reason of a prior equity against
 “ a man who had a legal title, that man should be
 “ hurt ; and this, by reason of that force this court
 “ necessarily and rightly allows to the common law
 “ and to legal titles. But if this had happened in
 “ any other country, it could never have been made
 “ a question ; for if the law and equity are administered
 “ by the same jurisdiction, the rule *qui prior est tempore*
 “ *potior est jure*, must hold. This has gone so far,
 “ (and the original case was), that if a *puisne* incum-
 “ brancer took in the first incumbrance *pendente lite*,
 “ still he should have the same benefit ; for in *Marsh*
 “ *v. Lee*, there was a *lis pendens*, yet was not the party
 “ affected with it ; and so I take it in general it would
 “ be notwithstanding a *lis pendens* ; because the prin-
 “ ciple upon which all these cases depend is this, that
 “ a man’s having notice of a second incumbrance at
 “ the time of taking in the first, does not hurt ; it is
 “ the very occasion that shews the necessity of it. It
 “ is only notice at the time of taking in the third that
 “ will affect him ; for then no act he can do will help

“ him. Then a *lis pendens* is nothing but notice : an
 “ actual notice is certainly as good as that by a *lis*
 “ *pendens* : one notice is in consideration of this court
 “ as strong as another.—Nay, actual notice is stronger
 “ than that implied by a *lis pendens* ; it will not there-
 “ fore affect him. That was *Marsh v. Lee*, and the
 “ other cases which I agree to. But no case is cited
 “ wherein a *puisne* incumbrancer, a party in a cause,
 “ and a decree made in that cause for satisfaction of
 “ incumbrancers, according to their respective priorities,
 “ has taken in a prior to tack to his *puisne* incum-
 “ brance, that he shall be allowed to make use of that
 “ in any other shape than that original incumbrancer
 “ would be. I am of the same opinion as Lord
 “ *Cowper* was, in the *Earl of Bristol v. Hungerford* in
 “ general, and do think it would be most mischievous
 “ and pernicious if the court should allow that doc-
 “ trine of tacking to be carried to that extent. First,
 “ taking it upon the terms of the decree, all these de-
 “ crees, where there are several incumbrancers before
 “ the court, a sale directed, and every thing necessary
 “ to be done to clear the estate in order to that sale,
 “ proceed on this foundation ; that the rights of the
 “ parties are to be taken as they stood at the time of
 “ the decree ; and therefore direct an inquiry into the
 “ priorities. What are those priorities ? Such as they
 “ stood at the time of the decree ; not that after that
 “ the priority shall be varied. The master is only to
 “ inquire, and that is into the condition it stood in at
 “ the time of making the decree. It is very different
 “ from the case put for the plaintiff, of a decree to in-
 “ quire

“ quire as to a good title. Certainly, where there is
 “ a contract for sale of an estate, difficulties to the title
 “ often happen, which must be cleared up afterwards ;
 “ and then what was said for the plaintiff shall be al-
 “ lowed. But the terms of these decrees are very dif-
 “ ferent. Not to rest upon the niceties of the words
 “ of these decrees, the sense, reason, and justice of the
 “ case require it ; for, otherwise, where an incum-
 “ brancer on an estate, which is affected with several
 “ incumbrances, brings a bill for satisfaction of his
 “ incumbrance, and all proper parties, and has a de-
 “ cree for it, as between himself and the owner of the
 “ equity of redemption ; some of the incumbrances
 “ are prior, others posterior to his :—if it is allowed,
 “ that after such a decree is made, one of those defend-
 “ dants, who happened to be prior to him, should con-
 “ vey to another defendant who was *puisne* to him, it
 “ would shut out the plaintiff after the decree made,
 “ at which time the rights are to be considered. What
 “ would be the consequence ? Nothing could lay a
 “ foundation for greater collusion and contrivance
 “ between the parties, to exclude each other, than
 “ such a liberty would, and to the great deceit of the
 “ plaintiff ; for then a man shall lose his costs by such
 “ a proceeding, the plaintiff having a right to his debt,
 “ principal, interest, and costs, according to the respec-
 “ tive priorities ; and that is the direction of the de-
 “ cree : and here was a sufficient fund, according to
 “ his then right, to pay all that ; but after that decree
 “ was made, two of these defendants may, by collusion,
 “ give a third incumbrancer more than his debt ; and

“ it may be worth while to do so, in order to exclude
 “ the plaintiff, who happens to be a second incum-
 “ brancer. It would be carrying securities to market
 “ in that manner, whereby the purchaser of them shall
 “ not only stand in the place of the party selling, but
 “ would acquire a new equity, which it would be mis-
 “ chevious to allow; I mean in general cases. This
 “ is just the same to persons incumbrancers who were
 “ not parties to the suit, but who will come in under
 “ the decree; for they must come in and submit to the
 “ same terms of that decree, though no parties; and
 “ therefore this judgment creditor of 1694, if they
 “ could not make a title without him, must have come
 “ in under the terms of the decree to receive a satis-
 “ faction out of the purchase money, but shall not be
 “ suffered, after this decree made, to assign his judg-
 “ ment, so as to give a new right to the assignee of it,
 “ not only to receive his, but to increase the first in-
 “ cumbrance. That doctrine is contrary to the mean-
 “ ing of these decrees and to the justice of the case,
 “ and would open such a door for traffic and market-
 “ ing between creditors as would introduce mischief,
 “ and therefore it is not to be allowed. This is said to be
 “ an interlocutory decree, and like a decree *quod com-*
 “ *putet*: But why is it interlocutory? It is the judg-
 “ ment of the court, and not in the nature of such
 “ a decree *quod computet*; which depends on a dif-
 “ ferent reason. Therefore I never was clearer in
 “ opinion than upon this part of the case, as to the
 “ general right. If the plaintiff can distinguish this
 “ from the cases, that might be a different consider-
 “ ation;

“ation; and that will depend on his manner of
“charging it: but this is my opinion upon the ge-
“neral right.”

§ 56. As the principal point upon which the doctrine Of Notice.
of tacking prior to subsequent incumbrances depends
is, whether the mortgagee had notice of the prior in-
cumbrance at the time of his purchase; it will be
necessary to examine what circumstances constitute
notice of a prior incumbrance.

§ 57. Notice is either direct or constructive. Direct Direct
notice is an actual and positive knowledge of a prior Notice.
incumbrance, regularly and formally communicated to
a mortgagee,

§ 58. Notice given to the attorney, solicitor, or 2 Vern. 574.
agent of a mortgagee, is a sufficient notice to the party Gilb. Rep. 8.
himself. But such notice to an agent or counsel must 3 Atk. 294.
be confined to the same transaction; for notice in an-
other transaction will have no effect.

§ 59. Where all the securities are prepared by the Brotherton
same person, notice to that person operates as a notice v. Hatt,
to all the parties concerned in the transaction. 2 Vern. 574.

§ 60. With respect to constructive notice, Mr. Constructive
Fonblanque observes, that it were extremely difficult to Notice.
extract from the cases any general rule on the subject. Treat. of Eq.
It seems, however, to be held, that every man shall be b. 3. c. 3. s. 1.
presumed to have notice of a decree. So, of the in-
strument under which the party with whom he con-
tracts

tracts as executor or trustee derives his power. It seems also agreed, that where a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed to have notice of such fact. So, whatever is sufficient to put a party on enquiry, is good notice in equity.

Forrest. Rep.
65.

Hitchcock v.
Sedgwick,
2 Vern. 157.

§ 61. A person is not bound to take notice of an act of bankruptcy; for it may be committed in so secret a manner as not to be easily known. But a commission of bankruptcy is a public act, of which every person is bound to take notice.

1 Cha. Ca.
86.
2 Atk. 275.

§ 62. A judgment, though on record, is not in itself notice to a purchaser or mortgagee; for although a purchaser is, at law, bound to take notice of a judgment; yet, in equity, where the cognizee of a judgment claims to be allowed to extend his judgment against a purchaser, who has got a prior term or incumbrance, he must prove express or constructive notice of the judgment, otherwise he will not be relieved.

Vide Tit. 32.

§ 63. A memorial of a conveyance registered in pursuance of the register act, is not in itself notice to a subsequent incumbrancer.

TITLE XV.

MORTGAGE.

CHAP. VI.

Of Foreclosure.

- | | |
|---|---|
| § 1. <i>Nature of.</i>
7. <i>A Decree of Foreclosure binds an Intail.</i>
9. <i>Where Infants are barred.</i>
12. <i>Feme Coverts bound.</i> | 13. <i>Time of Payment sometimes enlarged.</i>
15. <i>Decrees of Foreclosure sometimes opened.</i> |
|---|---|

Section 1.

AS the courts of equity allowed persons who had mortgaged their lands to redeem them long after the day of payment was passed, and the condition forfeited at law, it became also necessary to establish certain rules for enabling the mortgagee to determine this right of redemption. This may be done after the day of payment is past, by the mortgagee's calling on the mortgagor, in a court of equity, to redeem his estate presently, or, in default thereof, to be for ever foreclosed, that is, barred, from any farther right of redemption.

§ 2. Where the estate is reversionary, and, in many other cases, the prayer of the bill is, that the estate may be sold, and the mortgagee paid his principal, interest, and costs.

§ 3. A court

Bonham v.
Newcomb,
1 Vern. 232.
2 Vent. 365.

§ 3. A court of equity will not decree a foreclosure, until the mortgage is forfeited; for it will not shorten the time allowed by the agreement of the parties.

Booth v.
Booth,
2 Atk. 343.
7 Term R.
185.

§ 4. A mortgagee may bring an ejectment at the same time that he has a bill of foreclosure depending. But special circumstances may arise, which will take the case out of the common rule, and induce the court to grant an injunction to stay the proceedings at law.

2 Atk. 101.

§ 5. The Court of Chancery will not point out what title the mortgagor shall make on a bill to foreclose; but will decree him to make such title to the mortgagee as he is capable of doing.

1 Vcl. R.
406.

§ 6. In *Welch* mortgages, when no precise time is fixed for redemption, there can be no foreclosure, although the mortgagor may redeem at any time.

A Decree of
Foreclosure
binds an In-
tail.

§ 7. Where an equity of redemption is intailed, a decree of foreclosure will bind all persons claiming under such intail.

Roscarrick v.
Barton,
1 Cha. Ca.
217.

§ 8. A person having made a mortgage, afterwards settled the equity of redemption on himself for life, remainder to his issue in tail, remainder to his brother in tail. The mortgagee exhibited his bill against the mortgagor to foreclose, without making his brother a party, and obtained a decree for that purpose. Upon the

the death of the mortgagor without issue, his brother filed his bill to redeem.

Reynoldson
v. Perkins,
Amb. 564.

The cause was heard before the Lord Keeper, assisted by Lord *Hale*, *Wyld*, and *Wyndham*.

It was insisted for the defendant, that the deed, under which the plaintiff claimed, was voluntary; and that, although a voluntary conveyance would pass an equity of redemption, yet, in this case, where the plaintiff claimed an equity of redemption by way of intail, it ought not to be countenanced in equity, for the consequence would be, to make an equity of redemption perpetual.

Hale,—" By the growth of equity on equity, the
" heart of the common law is eaten out, and legal
" settlements are destroyed; and was of opinion, there
" was no colour for a decree. In 14 *Rich.* 2., the
" Parliament would not admit of redemption, but
" now there is another settled course. As far as the
" line is given, man will go: and, if an hundred
" years are given, man will go so far; and we know
" not whither we shall go. An equity of redemption
" is transferrable from one to another now, and yet,
" at common law, if he that had the equity made
" a feoffment, or levied a fine, he had extinguished
" his equity at law; and it hath gone far enough al-
" ready, and we will go no farther than precedents in
" the matter of equity of redemption, which hath too
" much favour already; and concluded there should be
" no decree for the plaintiff. And a decree to foreclose
" a tenant

Ante, ch. 1.
f. 8.

“ a tenant in tail, shall bind his issue in an equity of
 “ redemption, because that is a right only set up in
 “ a court of equity, and so may be here extin-
 “ guished.”

The Lord Keeper concurred in opinion, and the bill was dismissed.

When In-
 fants are
 barred.

3 P. Wms.
 401.

§ 9. A decree of foreclosure may be made against an infant. But in all such decrees, a day is given to the infant to shew cause against it, within six months after he attains his age of 21 years. If he does not shew any cause within that time, the decree is made absolute upon him ; but he may, upon motion, put in a new answer, and make a new defence.

Id. 352.

§ 10. In a case of this kind, though the infant has six months after he comes of age to shew cause against the decree, yet he will not be allowed to open the account, nor is he entitled to redeem the mortgage, by paying what is reported due ; but is only permitted to shew an error in the decree.

Sale v.
 Freeland,
 2 Vent. 351.

§ 11. Where the mortgage depended upon a disputable title, namely, whether the ancestor of the infant had properly executed a power out of which his right to mortgage arose, the court would not decree the infants to be foreclosed until they came of age.

Feme Coverts
 bound.

3 P. Wms.
 352.

§ 12. A feme covert is bound by a decree of foreclosure, and has no day given to her, or her heirs, to shew cause against the decree after the coverture is determined :

determined: for a feme covert, having by her own act delegated her power to her husband, must be liable to all the consequences of his neglect.

§ 13. The time for payment limited in the decree of foreclosure, may be enlarged by the court in consequence of particular circumstances, though such decree be signed and inrolled.

Time of
Payment
sometimes
enlarged.

§ 14. A decree of foreclosure was made, and six months time was given, according to the usual form of those decrees. The six months were near expiring, and then the mortgagor got an order for enlarging the time to six months more. After this, he obtained another order for enlarging the time six months more: but part of the latter order was, that he should sign the register's book, not to ask any farther enlargement. He signed the register's book accordingly; but, notwithstanding, he again moved for another enlargement of six months, chiefly upon the circumstance, that the estate was of greater value than the incumbrance upon it. Lord *Hardwicke* was of opinion, that, upon that circumstance, the motion was reasonable, but made it part of his order, that this last time should be peremptory.

Anon.
2 Ab. Eq.
605.

§ 15. The Court of Chancery has, in some cases, opened decrees of foreclosure, and allowed the mortgagor farther time to redeem his estate.

Decrees of
Foreclosure
sometimes
opened.

§ 16. A decree of foreclosure was opened after sixteen years, where the bill was against a mortgagor who

Burgh v.
Langton,
5 Bro. Parl.
Ca. 213.

who had obtained his security, part by original mortgage, and part by assignment, procured under colour of being a friend to the mortgagor; but, in truth, with a view to get him into his power, that the mortgagee might, upon his own terms, purchase his estate, which was worth three times as much as the money that had been advanced on it.

*Lant v.
Crispe,
5 Bro. Parl.
Ca. 200.*

§ 17. But, in another case, it was held by the House of Lords, not to be consistent with the rules and practice of courts of equity, or warranted by precedents, to enlarge the time for redemption of a mortgage, after the mortgagor's acquiescence for six years, under a foreclosure by his own consent; and especially, after an alteration had been made in the estate, either by pulling down buildings, or enlarging them, or otherwise.

*Wichalse v.
Short,
3 Bro. Parl.
Ca. 558.*

§ 18. It has also been determined by the House of Lords, that, after a decree of foreclosure made absolute, and an acquiescence of eleven years, in the mortgagee's possession under it, no parol evidence of his promising to account and reconvey, on payment of his money, can be admitted.

*Jones v.
Kenrick,
5 Bro. Parl.
Ca. 244.*

§ 19. And, in another case, it was determined that a decree of foreclosure, after an acquiescence of 20 years, should not be set aside upon a bill of review, for errors in form only, and not of substance; and, therefore, that a demurrer to such a bill was good.

TITLE XVI.

REMAINDER*.

CHAP. I.

Of the Nature and different Kinds of Remainders.

CHAP. II.

Of the Event upon which a Contingent Remainder may be limited.

CHAP. III.

Of the Estate necessary to support a Contingent Remainder.

CHAP. IV.

Of the Time when a Contingent Remainder should vest.

CHAP. V.

Of Remainders limited by way of Use and Contingent Uses.

CHAP. VI.

How Contingent Remainders and Contingent Uses may be destroyed.

CHAP. VII.

Of Trustees to preserve Contingent Remainders.

CHAP. VIII.

Of other Matters relating to Remainders.

* It is impossible to treat of this Title without transcribing many parts of Mr. Fearn's excellent work on Contingent Remainders. The Reader will, however, observe, that the cases are in general more fully

CHAP. I.

Of the Nature and different Kinds of Remainders.

- | | |
|---|--|
| <p>§ 1. <i>Of Estates in Possession and Expectancy.</i></p> <p>2. <i>Of Remainders.</i></p> <p>7. <i>Of Vested Remainders.</i></p> <p>9. <i>Of Contingent Remainders.</i></p> <p>20. <i>Exceptions.</i></p> <p>21. <i>Limitation to A. for Ninety Years, if he shall so long live.</i></p> <p>28. <i>Rule in Shelley's case.</i></p> <p>29. <i>Limitation to the right Heirs of the Grantor.</i></p> <p>30. <i>Heir sometimes a descriptio Personæ.</i></p> <p>31. <i>What Kind of Uncertainty renders a Remainder contingent.</i></p> <p>39. <i>An intervening Remainder may be contingent, and a subsequent one vested.</i></p> | <p>44. <i>Two contingent Estates in Fee may be limited in the Alternative.</i></p> <p>51. <i>But no Estate after a Remainder in Fee can be vested.</i></p> <p>55. <i>Except a contingent determinable Fee.</i></p> <p>57. <i>A Power of Appointment does not suspend the subsequent Limitations.</i></p> <p>58. <i>Where a Contingency annexed to the preceding Estate is a Condition Precedent.</i></p> <p>69. <i>Adverbs of Time only denote the Period when a Remainder is to vest in Interest.</i></p> |
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Section 1.

Of Estates in Possession and Expectancy.

WE now come to consider estates with regard to the time of their enjoyment, as they are either in possession or expectancy. Estates in possession are those where the tenant is entitled to the actual pernan-
 cy of the profits. Estates in expectancy are those where the right to the pernan-
 cy of the profits is postponed to some future period, and are of two sorts—remainders and reversions.

stated, and several modern ones added. The Chapters on Contingent Remainders limited by way of Use and Contingent Uses are new. As to the discussion of the rule in *Shelley's case*, which occupies more than half the work, it is entirely omitted, as not properly falling under this Title.

§ 2. An estate in remainder may be defined to be, Of Remain-
ders.
an estate limited to take effect, and be enjoyed, after another estate is determined. As if a man, seised of lands in fee-simple, grants them to *A.* for 20 years, and after the determination of that term, to *B.* and his heirs for ever:—*A.* is tenant for 20 years, with remainder to *B.* in fee.

In the first place, an estate for years is created or carved out of the fee, and given to *A.*, and then the residue or remainder of the estate is given to *B.* Both these interests are, however, but one estate: the present term for years and the remainder after, when added together, being equal only to one estate in fee. They are different parts constituting one whole, being carved out of one and the same inheritance: they are both created and subsist at the same time, the one in possession, and the other in expectancy.

§ 3. Lord *Coke* defines a remainder to be, “*A* 1 Inst. 143
“ remnant of an estate in lands or tenements expectant
“ on a particular estate created together with the same
“ at one time.” From which it follows, that where-
ever the whole fee is first limited, there can be no re-
mainder in the strict sense of that word; for the
whole being first disposed of, no remnant exists to
limit over.

§ 4. Thus, if lands are limited to a person and his 1 Ab. Eq.
186.
heirs, and if he dies without heirs, that they shall re-
main over to another; the last limitation is void.

§ 2

§ 5. A person

Dyer, 33 a.
1 Ab. Eq.
186.

§ 5. A person devised lands in *London* to the prior and convent of *St. Bartholomew*, so as they paid annually sixteen marks to the dean and chapter of *St. Paul*; and if they should fail of payment, that their estate should cease, and that the dean and chapter should have it. It was held that the remainder was void, because the first devise carrying a fee, nothing remained to be disposed of.

1 Inst. 18 a.
Vaugh. 269.
10 Rep. 97 b.

§ 6. In the case of a qualified or base fee, no remainder can be limited upon it. Thus, Lord *Coke* says, if lands be given to *A.* and his heirs, so long as *B.* hath heirs of his body, remainder over in fee; the remainder is void.

Of Vested
Remainders.

§ 7. Remainders are either vested or contingent. Vested remainders, or remainders executed, are those by which a present interest passes to the party, though to be enjoyed *in futuro*; and by which the estate is invariably fixed to remain to a determinate person after the particular estate is spent. As if *A.* be tenant for years, remainder to *B.* in fee; hereby *B.*'s remainder is vested, which nothing can defeat or set aside. So, where an estate is conveyed to *A.* for life, remainder to *B.* in tail, remainder to *C.* in tail, with twenty other remainders over in tail to persons *in esse*; all these remainders are vested.

§ 8. The person entitled to a vested remainder has an immediate fixed right of future enjoyment, that is, an estate *in præsenti*; though it is only to take effect in

in possession and pernity of the profits at a future period. And such an estate may be transferred, aliened, and charged, much in the same manner as an estate in possession.

§ 9. A remainder is contingent when it is limited to take effect on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding particular estate ; in which case, as will be shewn hereafter, such remainder never can take effect.

Of Contingent Remainders.

§ 10. There are, according to Mr. *Fearne*, four kinds of contingent remainders :—1st, Where the remainder depends entirely on a contingent determination of the preceding estate itself. As if *A.* makes a feoffment to the use of *B.* till *C.* returns from *Rome*, and after such return of *C.*, then to remain over in fee ; here the particular estate is limited to determine on the return of *C.*, and only on that determination of it is the remainder to take effect : but that is an event which possibly may never happen, and, therefore, the remainder, which depends entirely upon the determination of the preceding estate by it, is contingent.

3 Rep. 20 a.

§ 11. *A.* levied a fine to the use of *B.* and the heirs of his body, until *B.* should go about to sell, alien, &c. and after the estate of *B.* and the heirs male of his body, by any such attempts determined, &c. then to the use of the heirs male of the body of *B.*, and for default of such issue, then to the use of *C.* in tail until, &c. as before, and after to the use of *D.* in tail, as was

Arton v. Hare, Popham, 97.

before limited to *C.* It was agreed, that no remainder could enure over to *C.* without an attempt precedent by *B.* to determine his estate; because the estate of *C.* was not limited to begin, but upon such an attempt precedent.

Large's case,
3 Leon. 182.

§ 12. A person devised lands to his wife, and in case she was disturbed, then the lands to remain to *J. S.* in fee. It was held that this was a good remainder; but would not take effect, unless the wife was disturbed.

§ 13. The second kind of contingent remainder is, where some uncertain event, unconnected with, and collateral to the determination of the preceding estate, is, by the nature of the limitation, to precede the remainder.

1 Inst. 378 a.

Thus, Lord *Coke* says, if a lease for life be made to *A.*, *B.*, and *C.*, and if *B.* survive *C.*, then the remainder to *B.* and his heirs; here, the want of *B.*'s surviving *C.* does not affect the determination of the particular estate; nevertheless, it must precede, and give effect to *B.*'s remainder: but as such event is dubious, the remainder is contingent.

Doe v.
Scudamore,
2 Bosan. 289.

§ 14. *Thomas Lane* devised as follows:—" I give
" and devise my messuage, &c, unto and to the use of
" my brother *George Lane*, and his assigns, for and
" dur. . . . term of his natural life without impeach-
" ment of waste, and from and after his death; then
" I give and devise the same unto and to the use of
" *Catharine*

“ Catharine Bengier, her heirs and assigns for ever, in
 “ case she the said Catharine Bengier shall survive and
 “ outlive my said brother, but not otherwise; and in
 “ case the said Catharine Bengier shall die in the life-
 “ time of my said brother, then, and in such case, I
 “ give and devise my said messuage, &c. unto and to
 “ the use of my brother George Lane, his heirs and
 “ assigns for ever.”

It was held, that this was a contingent remainder in
Catharine Bengier.

§ 15. The third kind of contingent remainder is,
 where it is limited to take effect upon an event which,
 though it certainly must happen some time or other,
 yet may not happen till after the determination of the
 particular estate,

Thus, Lord Coke says, if a lease be made to J. S. 3 Rep. 204.
 for his life, and, after the death of J. D., to remain
 to another in fee, this remainder is contingent; for,
 although J. D. must die some time or other, yet he
 may survive J. S., by whose death the particular estate
 will determine, and the remainder become void.

§ 16. The fourth sort of contingent remainder is,
 where it is limited to a person not ascertained, or not
 in being at the time when such limitation is made.

Thus, if a lease be made to one for life, remainder 1 Inst. 378 a.
 to the right heir of J. S.; now there can be no such 3 Rep. 204.
 person as the right heir of J. S. until his death, for

nemo est hæres viventis, and J. S. may not die until after the determination of the particular estate, therefore such remainder is contingent.

§ 17. The usual remainder limited in all settlements before marriage, to the first and other sons of the intended husband, by his intended wife, is a contingent remainder.

Cro. Car. 102.

§ 18. So, where an estate is limited to two persons for life, remainder to the survivor of them in fee, such remainder is contingent, because it is uncertain which of them will survive.

§ 19. The instances produced of the first kind of contingent remainders, may appear to be cases of conditional limitations, not falling strictly within the definition of a remainder: but it will be proved in the next Chapter, that they are remainders in the most strict and technical sense of the word.

Exceptions.

§ 20. There are some cases which fall literally under one or other of the two last descriptions, which are nevertheless ranked among vested estates.

Limitation
to A. for 90
Years, if he
shall so long
live.

§ 21. With respect to those cases which are exceptions to the third kind of contingent remainders, it has been held, that a limitation to A. for 80 or 90 years, if he shall so long live, with a remainder over, after the death of A., to B. in fee, is not deemed a contingent remainder; for the mere possibility, that a life in being may endure for 80 or 90 years after such a limitation

tation is made, does not amount to a degree of uncertainty sufficient to render a remainder contingent.

§ 22. Lord *Derby* covenanted to stand seised, to the use of himself for life, remainder to another person, for 89 years, if *Ferdinando* his son should so long live, remainder, after the death of *Ferdinando*, to his second son in tail. It was adjudged, that the remainder vested presently, and that the possibility of *Ferdinando's* outliving the term of 89 years, would not make the remainder contingent,

Lord *Derby's* case, Lit. Rep. 370.

Pollex. 67.

§ 23. *A.* made a feoffment in fee to the use of himself for life, remainder to the feoffees for 80 years, if *B.* and *C.* his wife should so long live; and if *C.* survived *B.*, then to the use of *C.* for life, and, after her death, to the use of the first son of *C.* and *B.* in tail; and for default of such issue, to the use of *D.* and *E.*, and the heirs of their bodies, remainder to the right heirs of *A.* *A.* died and *C.* died, leaving a son who died without issue; and, thereupon, *D.* and *E.* entered and made a lease to the plaintiff, upon whom the defendant, as son and heir of *A.*, entered. The question was, whether the remainder in tail to the first son of *C.* and *B.*, and the remainder to *D.* and *E.*, were executed, or were contingent upon the estate for life to *C.*; and it was adjudged that they were vested, and not contingent; and that the possibility of *B.* and *C.* outliving the term of 80 years, did not make the remainders to them contingent. And Lord *Derby's* case was stated and admitted.

Napper v. Sanders, Hutt. 119.

§ 24. This

Pollex. 67.

§ 24. This doctrine is further confirmed by Lord *Hale*, who laid it down, that if a feoffment were made to the use of *A.* for 99 years, if he should so long live, and, after his death, to the use of *B.* in fee, this should not be contingent, but it should be presumed his life would not exceed 99 years.

3 Rep. 20a.

§ 25. But if the term of years is so short, as to leave a common possibility, that the life on which it is determinable may exceed it, the remainder will be deemed contingent. And, therefore, if an estate is limited to *A.* for 21 years, if he shall so long live; and, after his death, to *B.* in fee, this is a contingent remainder; because there is no improbability in supposing, that the life may exceed the term,

Beverley v.
Beverley,
2 Vern. 131.

§ 26. Sir *James Beverley* devised lands to his eldest son *Thomas* for the term of 60 years, if he should so long live, and, from and after his decease, to his grandson *James*, the eldest son of *Thomas*, in tail male, remainder in tail to *Thomas*, his next brother, *James*, the grandson, intermarried with the plaintiff; and, upon the marriage, a settlement was made, and a common recovery suffered by *Thomas* the father and *James* the son.

It was objected, that the devise to *Thomas* being only a term of 60 years, if he should so long live, and then to *James*; that the freehold, during the life of *Thomas*, was in abeyance, and no good tenant could be made to the *præcipe*; and, by consequence, *James* the grand-son

son being dead without issue male, the lands belonged to the defendant *Thomas* under the intail.

Mr. *Finch* argued for the plaintiff, that the recovery was well suffered, and that the limitation of the intail was good expectant on the term for 60 years; and that it was so resolved in Lord *Derby's* case. That the devise to *Thomas* for 60 years, if he should so long live, and from and immediately after his decease, *that* ought to be intended of his dying within the term, which was highly presumable, *Thomas* being then above 40 years of age, the possibility that *Thomas* might overlive was a very remote conjecture; so that there was not any gap or *hiatus* in the settlement. But, by this construction, the freehold vested immediately in *James*, and *Thomas* had only a term for 60 years, if he should so long live.

Per curiam.—It would be hard to make such construction on the words of the will, as to say, where a term is limited to a man for 60 years, if he should so long live, and from and after his decease to *A. B.*, that it must be meant from and after his decease within the term; for, suppose he should outlive the term, should the remainder man take in the life of *Thomas*; that were a construction contrary to the words and intention of the testator..

§ 27. In all cases where it is not admitted that there is such a degree of possibility of the life's exceeding the term, as is supposed sufficient to create a contingency in the remainder, there (says Mr. *Fearne*) the remainder

Fearne, 26,

der cannot fall within the description of a freehold, to commence *in futuro*. For when we suppose the remainder to be vested, we, of consequence, admit, that it passes immediately, subject to, and expectant on the preceding term; for, otherwise, it cannot be vested; and then it is a freehold commencing *in presenti*, and not *in futuro*. If the life cannot exceed the term, and the term must determine with the life, the limiting an estate to commence from the expiration of the life, is, in effect, limiting it to commence from the determination of the term. In which latter mode of limitation, there could exist no doubt of the remainder's passing immediately, and being vested. And upon these principles alone, without recurring to any other, the case put, and distinction taken, by Lord *Hale*, may be admitted as law.

Ante, f. 24.

Rule in Shelley's case.

§ 28. There are three exceptions to the fourth sort of contingent remainders. The first arises from a rule of law, that wherever the ancestor takes an estate of freehold, and a remainder is thereon limited, in the same conveyance to his heirs, or to the heirs of his body, such remainder is immediately executed in the ancestor so taking the freehold, and is not contingent. The origin of this rule, and the cases which have arisen upon it, will be stated under the Titles *Deed* and *Devise*.

Limitation to the right Heirs of the Grantor.

§ 29. The second exception arises from a principle stated in Title 11., *Use*, ch. 4. sect. 26, that an ultimate limitation to the right heirs of the grantor will continue in him, as his old reversion, and not as a remainder,

mainder, although the freehold be expressly limited from him.

§ 30. The third exception arises from the respect which the law pays to the intent of a testator, where it can be plainly collected from his will, that he used the words heirs of the body, as a *descriptio personæ*, or sufficient designation of the person for the remainder to vest, notwithstanding the general rule that *nemo est heres viventis*. The cases in which this point has occurred, will be stated under the Title *Devise*.

Heir sometimes a
Descriptio
Personæ.

§ 31. There is a very material difference between that kind of uncertainty which makes a remainder contingent, and an uncertainty of another kind, *viz.* the uncertainty of a remainder's ever taking effect in possession. For wherever there is a particular estate, the determination of which does not depend on any uncertain event, and a remainder is thereon absolutely limited to a person *in esse*, and ascertained, in that case, notwithstanding the nature and duration of the estate limited in remainder may be such, as that it may not endure beyond the particular estate, and may therefore never take effect, or vest in possession, yet it is not a contingent, but a vested remainder. As, if a lease be to *A.* for life, remainder to *B.* for life, or in tail, here, notwithstanding *B.* may possibly die, or die without issue, in the life-time of *A.*, and, consequently, never come into possession, yet is his remainder vested in interest, and by no means comprised in the legal notion of a contingent estate.

What Kind
of Uncertain-
ty renders a
Remainder
contingent.
Fearn, 327.

§ 32. It

Title XVI. Remainder. Ch. i. § 32—34.

§ 32. It is not the uncertainty of ever taking effect in possession, that makes a remainder contingent, for to that every remainder for life, or in tail, expectant on an estate for life, is and must be liable; as the remainder man may die, or die without issue, before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder, from one that is contingent.

Fearne, 329.

§ 33. Thus, if there be a lease for life to *A.*, remainder to *B.* for life, here, the remainder to *B.*, although it may possibly never take effect in possession, because *B.* may die before *A.*, yet, from the very instant of its limitation, it is capable of taking effect in possession, if the possession were to fall by the death of *A.* It is therefore vested in interest; though, perhaps, the interest so vested may determine by *B.*'s death, before the possession he waits for may become vacant.

§ 34. On the other hand, if there be a lease for life to *A.*, and after the death of *J. D.*, remainder to *B.*, in tail, in that case, the remainder to *B.* is not capable of taking effect in possession during the life of *J. D.*, although the possession should fall by the determination of *A.*'s estate: but if *J. D.* chance to die before the determination of the particular estate, then does *B.*'s remainder, by such event, become capable of taking effect in possession, when it shall happen to fall,
and

and is then in the same state as if it had been originally limited without any regard to the death of *J. D.*

This very essential alteration in the nature of *B.*'s remainder, occasioned by the timely event of *J. D.*'s death, is the change of a contingent, into a vested estate. Before that event, it had not the capacity of vesting in possession, and it was doubtful whether it ever would have it or not ; it was therefore not vested at all. By that event, it acquires the capacity of vesting in possession, when the possession becomes vacant ; it is therefore vested in interest, though it is yet uncertain whether it ever will vest in possession ; for it is still possible that *B.* may die without issue during the continuance of the particular estate.

§ 35. It follows, that whenever the preceding estate is limited, so as to determine on an event which certainly must happen, and the remainder is so limited to a person *in esse*, and ascertained, that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder, such remainder is vested. On the contrary, whenever the preceding estate (except in the cases before mentioned as exceptions to the descriptions of a contingent remainder) is limited, so as to determine only on an event which is uncertain, and may never happen ; or wherever the remainder is limited to a person not *in esse*, or not ascertained ; or wherever it is limited so as to require the concurrence of some dubious uncertain event, independent of the determination of the preceding estate, and duration of the estate limited in remainder,

remainder, to give it a capacity of taking effect, then the remainder is contingent.

Fearne, 331.

§ 36. Where an estate is limited to *A.* for life, remainder to *B.* during the life of *A.*, it is a vested remainder; for here is a preceding estate to determine on an event which certainly must happen, the death of *A.*, and the remainder is so limited to a person *in esse*, that the preceding estate may, by some means, (*viz.* by forfeiture or surrender), determine before the expiration of the estate limited in remainder, that is, before the expiration of *A.*'s life: accordingly, if *A.*'s life be not expired at the determination of the particular estate, which it will not if *A.* should commit a forfeiture, or make a surrender, then will the remainder take effect in possession.

§ 37. This doctrine was formerly doubted, but it has been resolved in a modern case, that a remainder to trustees during the life of a tenant for 99 years, if he should so long live, to take effect from and after the death of such tenant for life, or other sooner determination of the estate limited to him, was a vested remainder.

Berrington v.
Parkhurst,
3 Atk. 135.
Willis R. 327.

§ 38. *John Dormer*, upon the marriage of his eldest son, conveyed several estates (after a great number of preceding limitations for life and in tail), to the use of *Robert Dormer* for 99 years, if he should so long live, and, from and after the death of the said *Robert Dormer*, or other sooner determination of the estate limited to him for 99 years, to the use of trustees and their heirs,

heirs, during the life of the said *Robert Dormer*, upon trust to preserve the contingent remainders therein-after limited, and after the end or other sooner determination of the said term, to the use of the first and other sons of the said *Robert Dormer* successively in tail male, with remainder over.

One of the questions in this case was, whether the remainder limited to trustees to preserve contingent remainders, was a vested or a contingent remainder.

The Court of King's Bench determined, that it was a vested, and not a contingent remainder.

Upon a writ of error to the House of Lords, it was contended for the plaintiff in error, that the estate being limited to the trustees, *after the death of Robert Dormer*, during his life, was a void limitation, because it could never take effect in possession. That if the limitation to the trustees was not void, but the words *after the death of Robert Dormer* might be rejected, and the limitation to the trustees to take effect in the disjunctive, viz. *or other sooner determination of the term*, yet that the trustees by force of those words took no vested remainder, but their estate remained in contingency; for no remainder could be said to be vested, unless it was so limited as to come into the possession of the remainderman upon every determination which might happen of the particular estate. But the words *other sooner determination of the term*, could not extend to a determination of the term by effluxion of time, because the estate *after the end of the term*, (which, in a legal sense,

6 Bro. Parl.
Ca. 352.

always signified after the end by effluxion of time), was, by express words, limited to the first son of *Robert Dormer*; so that the words, other sooner determination, could extend only to a determination of the term by surrender or forfeiture, which might or might not happen. It was admitted, that when a remainder was limited to take effect in possession, upon an event which of necessity must happen, such remainder would vest; but if it was limited to take effect in possession upon an event which might never happen, then it did not vest. Now, it was not an event which must necessarily happen, that *Robert Dormer's* term should end by surrender or forfeiture, because it might determine by effluxion of time or death; so that the present case was no more than this, viz. a limitation to *Robert Dormer* for 99 years, if he so long live, and if his estate shall determine by surrender or forfeiture, then to the trustees during his life; and which was plainly no more than a contingent remainder. That this construction of the limitation to the trustees was most agreeable to, and best answered the intention of the parties to the settlement; the end and design of appointing trustees to preserve contingent remainders, in this and all other marriage settlements, being only to give them a right to enter, upon any conveyance made by the particular tenant for life or years, to destroy the contingent remainders before they arise.

On the other side it was argued, that the estate limited to the trustees to preserve the contingent remainders, was a vested remainder, to take effect in possession during the life of *Robert Dormer*, upon the determination

determination of the particular estate, limited to him for 99 years, either by effluxion of time, forfeiture, or surrender; and though that part of the limitation which depended upon the contingency of *Robert Dormer's* death, was of no operation or effect to vest an estate in possession in the trustees on that single event; yet, as the particular estate for 99 years might determine in his life-time by either of the other events happening, that is, forfeiture or surrender, the remainder vested in the trustees took effect in possession. And a remainder so limited is well warranted by the rules of law, and is neither void nor contingent. That to make this a contingent remainder from the words *or other sooner determination*, would be contrary to the established notion of what the law calls a contingent remainder; for such a remainder can only be one of these three ways:—either where the person to whom it is limited is not *in esse*, or where the particular estate may determine before the remainder can take effect, or where some collateral accident must happen before it can take effect. But none of these fell out in the present case; for the persons to whom the estate was limited, *viz.* the trustees, were existing. The remainder to them would take effect immediately upon the determination of the particular estate by surrender or forfeiture; and here was no collateral accident to happen before it could take place, but only such as made a determination of the particular estate, and what was implied in its very creation. The words, *or other sooner determination*, are what are implied in every term for years, and to which every term is subject by surrender or forfeiture: they are no other than what are made

use of in all common limitations of estates to trustees to preserve contingent remainders in every settlement. To put, therefore, such a construction upon these words, as to make the estate arising from them to the trustees a contingent remainder, would disappoint the very end proposed by them: it would frustrate the intention of the parties, and endanger most of the family settlements in the kingdom.

The Judges having been consulted on this case, Lord Chief Justice *Willes* delivered their unanimous opinion; of which I shall transcribe that part which relates to the present question.

Willes Rep.
337.

“ We deny that this estate so limited to the trustees
 “ was such a contingent remainder, that it did not vest
 “ immediately. The notion of a contingent remain-
 “ der is a matter of a good deal of nicety; and, if I
 “ should trouble you with all that is said in the books
 “ concerning contingent remainders, and the instances
 “ that are put of such contingent remainders, I am
 “ afraid it would rather tend to puzzle than enlighten
 “ the case. I choose, therefore, to tell your Lordships
 “ what are the contingent remainders that do not vest,
 “ and what remainders vest immediately, though they
 “ are sometimes (though very improperly) called con-
 “ tingent remainders. The definition which was given
 “ by the counsel for the appellants of a contingent
 “ remainder which does not vest, is, where the parti-
 “ cular estate may determine before the remainder can
 “ take place in possession; and that, if it is uncertain
 “ when it will take place in possession, and it may hap-
 “ pen

pen that it never will take place in possession, the remainder will not vest. But this is not a just definition; for, if this were true, it would overturn all the settlements that ever were made. I will mention but one instance, though I might mention a thousand; as, where an estate is limited to *A.* for his life, remainder to another, and the heirs of his body. I believe no man in his senses ever doubted but this was a vested remainder; and yet it is within their definition: for, suppose the remainder man in tail dies without issue, before the tenant for life, then this remainder will never take place in possession. As, therefore, this is not a proper definition, we beg leave to acquaint your Lordships what we think is, and we think there are but two sorts of contingent remainders which do not vest. 1st, Where the person to whom the remainder is limited is not *in esse* at the time of the limitation: 2dly, Where the commencement of the remainder depends on some matter collateral to the determination of the particular estate. Many instances of such contingent remainders might be put, which will fall under one of these heads; and I will beg leave to put one of each, the better to illustrate this matter. If the first limitation be to one for life, or for years, and the next limitation to the son of *B.*, who, at the time, has no children, this is a contingent remainder of the first sort. If there be a limitation to *A.* for life, remainder to *B.* after the death of *J. S.*, or when a third person then at *Rome* returns from thence, this is a contingent remainder of the second sort. In the first case, if the tenant for life should die, or the

“ term for years expire before *B.* has a son born, the
 “ remainder never vests at all. And, in the second
 “ case, if *B.* dies before *J. S.*, or before the man returns
 “ from *Rome*, the remainder never vests, because the
 “ death of *J. S.*, or the return of the person from
 “ *Rome*, were both conditions precedent. And these
 “ are instances, amongst many others, of contingent
 “ remainders which do not vest, and of which you
 “ may find great variety in *Boraston's* case, 3 *Coke*
 “ *Rep.* 26. But the present limitation to the trustees
 “ plainly does not fall under either of these heads.
 “ The trustees were persons in being, and their estate
 “ was not to commence on any collateral matter, but
 “ upon all determinations of the estate of *Robert Dor-*
 “ *mer* which could happen during his life; and the
 “ estate was limited to them for no longer time. To
 “ enforce and illustrate this, I beg leave to mention
 “ two or three other things. Will any one say, that
 “ any thing can descend to the heir that did not vest
 “ in the ancestor; so that, if nothing vested in the
 “ trustees, the limitation to them and their heirs is
 “ nonsensical. For, according to this notion, if they
 “ should die before the contingencies happen, their
 “ heirs can take nothing; and yet this word heirs
 “ has been put in every such limitation for 200 years
 “ last past, for it is so long since the statute of uses;
 “ so that, during that time, we have been all in the
 “ dark, and this new light is but just sprung up, which,
 “ if it prevail, for another reason as well as this, will
 “ overturn all the settlements for 200 years last past.
 “ For in every one of them, the limitation is either in the
 “ same words as the present, or, after the end or other
 “ sooner

“ sooner determination of the particular estate, which
 “ are words tantamount to this, for end or determina-
 “ tion certainly comprehends death, as well as effluxion
 “ of time. If, therefore, I could not make this con-
 “ sistent with the rules of law, though I humbly ap-
 “ prehend I plainly have, I should rather choose to
 “ put a construction on these words contrary to the
 “ rules of law, than overturn many thousand settle-
 “ ments, according to this maxim, founded on the
 “ best reason, *communis error facit jus*, and, *ut res*
 “ *magis valeat quam pereat*. But the present case, for
 “ the reasons I have already mentioned, is not, I think,
 “ liable to this objection : to prove which, I beg leave
 “ only to put one case. *A.*, tenant in fee, grants an
 “ estate to *B.* for 99 years determinable in his life,
 “ supposing *B.* outlive the term, or surrender, or for-
 “ feit, no one, I believe, will say but that *A.* may
 “ enjoy the estate again. If so, a contingent freehold
 “ was in him during the life of *B.*, for it could not be
 “ in *B.*, because he had only a chattel interest ; and it
 “ could not be in any one else. And if it were in *A.*,
 “ it must be a vested interest, for it was never out of
 “ him. And if *A.* had a contingent freehold during
 “ the life of *B.*, no one can say but that he might
 “ grant it over ; and if he do, it must be of the same
 “ nature it was when it was in *A.*, and, consequently,
 “ a vested freehold. And this case I have put is ex-
 “ pressly held to be law in *Co. Lit* 42 a., in *Cholmeley’s*
 “ case, 2 *Co.* 51 a., and in the *Year Book* of *Edward*
 “ 3., which is there cited.”

The judgment was affirmed.

An intervening Remainder may be contingent, and a subsequent one vested.

Fearne, 338.

§ 39. It frequently happens, that contingent remainders intervene between the particular estate, and other limitations over. Upon which cases, we must observe, that whenever a contingent remainder is limited, which is followed by another limitation over, if the contingent limitation be not in fee, the subsequent limitation may be vested, if it be made to a person *in esse*.

Uvedall v. Uvedall,
2 Roll. Ab.
119
Williams v. Duke of Bolton,
Tit. 3. f. 56.

§ 40. Thus, if an estate be limited to *A.* for life, remainder to his first and other sons in tail, remainder to *B.* for life, remainder to his first and other sons in tail, if *B.* has a son born before *A.*, such son will have a vested estate in remainder in him. But if *A.* should afterwards have a son, he will take a vested estate, which will precede the estate of *B.*'s son.

Lewis Bowle's case,
11 Rep, 97.

§ 41. Where lands were limited to husband and wife for their lives, and, after their decease, to their first issue male, and to the heirs male of such issue lawfully begotten, and so over to the second, third, and fourth issue male, &c. and, for want of such issue, to the heirs male of the body of the said husband and wife; it was held, that this last limitation should be executed *sub modo*, that is, in such manner as to open and separate itself from the first estate for life, whenever the contingency happened.

§ 42. The preceding cases are instances where the contingency of the intervening remainders arose from their being limited to persons not *in esse*. But if there be a remainder limited to a person *in esse*, so as to depend

pend on a contingent event, if the same contingency be not considered as extending to the subsequent limitations, such of those limitations as are to persons *in esse* may be vested,

§ 43. Thus, in the case of *Nepper v. Saunders*, one of the questions was, whether the remainders, subsequent to the remainder for the life of C., were contingent or vested? It was agreed, that C's. estate for life was contingent on the event of her surviving her husband: but still it was held, that the subsequent remainders were vested,

Ante.

Tracy v. Lethulier, Infra.

§ 44. We have seen, that no remainder can be limited after a limitation in fee; but two or more several contingent estates in fee may be limited, as substitutes or alternatives, one for the other, and not to interfere; but so that one only can take effect, and every subsequent limitation be a disposition, substituted in the room of the former, if the former should fail of effect.

Two contingent Estates in fee may be limited in the Alternative.

Fearne, 547.

§ 45. Sir *Michael Armyn* devised certain lands to *Evers Armyn* for life, and, in case he should have any issue male, then to such issue male and his heirs for ever; and if he should die without issue male, then he devised the manor of *Pickworth* to *Thomas Style* in fee, and the manor of *Willoughby* to Sir *Thomas Barnardiston* in fee. It was determined, that the first remainder was a contingent fee to the issue male of *Evers Armyn*, and the remainder to Sir *Thomas Barnardiston* was a contingent fee also, not contrary to, but concurrent

Loddington v. Kyme, 1 Ld. Raym. 203.

S. C. *Barnardiston v. Carter*, 3 Bro. Parl. Ca. 64.

1 Ld. Raym. 208.

Infra, ch. 6. rent with the former, according to the notion in *Plunkett v. Holmes*, and was a contingency with a double aspect. For if *Evers* had had issue male, then the remainder had vested in such issue male in fee; if he died without issue male, that is, (said *Treby*), if he never had issue male, then to Sir *Thomas Barnardiston* in fee. And these were not remainders expectant, the one to take effect after the other, but were contemporary.

Doe v. Holme,
3 Black. R.
777.

§ 46. A person devised all his lands to his son *J. L.*, for the term of his natural life, and, after his decease, unto the heirs male and female of the body of his said son *J. L.* for ever; and if his said son should die, leaving no lawful issue, then he devised the premises to his daughter *Elizabeth*, and her heirs and assigns for ever.

After the death of the testator, *J. L.*, the son entered, and suffered a recovery.

Vide ch. 6.

Ante.

The court was of opinion, that the son acquired an estate in fee simple by the recovery. For if it was an estate tail in him, there could be no doubt; and if he had only an estate for life, with remainder in fee to his heirs male and female, (which the court rather took it to be), then this being a contingent remainder, was destroyed by the common recovery; and all subsequent remainders depending thereon, were also barred according to the case of *Lodding v. Kyme*, which resembled this case in all points.

§ 47. A will was made in these words ; “ I give my
 “ messuage, &c. to my son J. S. for his life, and,
 “ after his death, unto all and every his children
 “ equally, and to their heirs ; and in case he dies with-
 “ out issue, I give the said premises unto my two
 “ daughters and their heirs, equally to be divided
 “ between them.”

Goodright v.
 Dunham,
 Doug. 265.

It was determined, that both the devises were con-
 tingent remainders in fee.

§ 48. A person devised lands to his niece *Dorothy*
 for life, remainder to trustees to preserve contingent
 remainders, remainder to all and every the children of
Dorothy, begotten or to be begotten by his nephew
 J. C. and their heirs for ever, to be equally divided
 among them ; but if only one child, then to such only
 child and his or her heirs for ever ; and, for default
 of such issue, to *James Comberbach* for life, remainder
 to trustees to preserve contingent remainders.

Doe v.
 Perryn,
 3 Term R.,
 484.

Lord *Kenyon* said, there was nothing to distinguish
 this case from *Loddington v. Kyme* and *Goodright* and
Dunham. The clear intent of the devisor was, that the
 children of *Dorothy*, if any, should take a fee ; and if
 she had no children, then that the remainders over
 should take effect ; but *Dorothy* had children, by which
 the limitations over were defeated.

§ 49. Mr. Serjeant *Hill*, in arguing the above case,
 cited a determination of Lord *Hardwicke* upon a case
 nearly similar.

Ives v. Legge,
 cited 3 Term
 Rep. 488.
 Forrest, M.S.

A person

A person devised to his wife *Elizabeth*, and her heirs, all his freehold, leasehold, and personal estate, charged with 200 *l.* to be laid out on a house, which he gave to his daughter *Marthana* during the term of her natural life, and, after her decease, then the same to go and be enjoyed by the children of her body begotten, and their heirs; and, in default thereof, to his son *William Legge*, his heirs and assigns, *William Legge* died in the life-time of *Marthana*, but devised his interest to the plaintiff, and then *Marthana* died without children. The question was, whether this devise to *William* was good, which depended upon what estate he took by his father's will; whether a vested remainder, or a remainder depending upon the contingency or possibility of *Marthana's* dying without children,

Lord Chancellor.—This is a vested remainder in *William Legge*; *Marthana* took no more than an estate for life; for when an estate for life is expressly given, no greater estate shall arise by implication: subsequent words of contingency, enlarging the estate, only where no express estate for life is devised. Then, as to the children, the question is, whether this be a limitation to them in fee or in tail? Had there been no remainder limited over, they would have taken a contingent remainder in fee: but there being a limitation to their uncle, it is impossible they should die without heirs, during his, or any of his children's life. The doubt arises from the equivocal words, *in default thereof*, whether they relate to *Marthana's* dying without children, or to the children's dying without heirs. If to the first, the case will then amount to that of *Lodding v. Kyme*,
and

and make this a fee with a double aspect, or, as it is called in that case, two concurrent contingencies, of which either is to start, according as it happens, being remainders contemporary, and not expectant one after another. But then both will be contingent, as well that to the children of *Marthana*, as that to *William*; which is a construction never made without an absolute necessity, as there was in *Loddington v. Kyme*, where the words were, “to *E. Armyn* for life, and in case he “have any issue male, then to such issue male and his “heirs for ever, and if he die without issue male, “then over.” And which was a very singular case. But here is no such necessity; the words, in default thereof, taking in both the contingencies, as well that of *Marthana*’s dying without children, as of her children dying without heirs, which brings it to no more than the common ordinary limitations in settlements, which take in all the contingencies that can happen. And as the court never construes a limitation into an executory devise, where it may take effect as a remainder, because the former puts the inheritance in abeyance; so, neither does it construe a remainder to be contingent, where it can be taken for vested, because the latter tends to support the estate, and the former to destroy it, by putting it in the power of the particular tenant to defeat the remainder, by fine or feoffment, which would have been the case here, by this forced construction of the defendant; since, by taking this for a contingent remainder in *William*, it would have been in *Marthana*’s power to destroy the whole before the birth of a child.

Tit. 38.

556.

Vide Doe v.
Reason,
3 Will. R.
244.

§ 50. Mr. *Fearne* observes, that in this last case the word *thereof*, upon which the construction turned, was equally applicable to the heirs of the children, as to the children themselves; and the heirs being the last antecedent, there was no ground for excluding the reference to them; which reduced the case to that of a devise to one and his heirs, and in default of heirs, then to a person who was a collateral heir of the first devisee.

But no Estate after a Remainder in Fee can be vested.

§ 51. Where there is a contingent limitation in fee absolute, no estate limited afterwards can be vested, except in one case, which will be mentioned hereafter.

Ante.
1 Ld. Raym.
208.

§ 52. Thus, in the case of *Loddington v. Kyme*, it was determined, that the remainders to *Thomas Style* and *Sir Thomas Barnadiston* were contingent, because the preceding limitation to the issue of *Evers Armyn* was a contingent fee; and the court took the distinction that where the mean estates are for life, or in tail, the last remainder may, if it be to a person *in esse*, vest; but that no remainder after a limitation in fee can be vested.

§ 53. In all cases where the first contingent remainder is in fee, or where there are concurrent remainders, if the first remainder becomes vested, all the subsequent remainders become void: for then they become remainders expectant on the determination of an estate in fee-simple, or concurrent remainders.

§ 54. Thus,

§ 54. Thus, in a case cited by Mr. Justice *Buller*, where the devise was to *G. Pinnock* for life, remainder to her first and other sons in tail general, and for default of such issue male, remainder over: and it was contended at the bar, that the word male might be rejected; but the court said they could not do it; but held that the remainder over was a contingent devise, only on the event of there never being a son, and if there were a son ever born, though he died, the remainder over was void. In that case, a son was born, who died during the life of *G. Pinnock*, on the birth of whom the estate vested in him, and the limitation over was void.

Keene v. Dickson,
3 Term R.
495.

§ 55. It seems, however, that a contingent determinable fee, devised in trust for some special purposes only, will not prevent a subsequent limitation to one *in esse* from being vested.

Except a
contingent
determinable
Fee.

§ 56. Sir *William Dodwell* devised all his estates to his daughter for life, remainder to trustees to preserve, &c., remainder to her first and other sons in tail; and in case his said daughter should die without issue of her body living at her decease, then he devised his estates to trustees and their heirs until his cousin Sir *H. Nelthorpe* should attain his age of 21 years, and then he devised all his estates to his said cousin Sir *H. N.* after he attained his age of 21 years for life, remainder to his first and other sons in tail male; and in default of such issue, or in case the said Sir *H. N.* should happen to die before he attained his age of 21 years, and without issue, then to *S. Lethulier* for life, &c.

Tracey v. Lethulier,
3 Atk. 774.
Amb. 204.

Lord

Lord *Hardwicke* held, that the contingency of the daughter's dying without issue living at her death, affected only the estate limited to trustees until Sir *H. N.* should attain 21. That this limitation to trustees was not an absolute fee, as was contended, but a determinable fee. That the estate limited to Sir *H. N.* was only contingent until he attained 21, and that this contingency extended to none of the subsequent estates; and, therefore, the remainders over to persons *in esse* were vested.

A Power of Appointment does not suspend the subsequent Limitations.

Vide Tit. 32.

§ 57. It frequently happens, that estates are subject to a power of appointment in the first taker, with remainders over in default of such appointment. It is now settled, that such a power does not suspend the effect of the subsequent limitations, and keep them in contingency.

Where a Contingency annexed to the preceding Estate is a Condition precedent.

Fearne, 355.

§ 58. As to the cases wherein a condition annexed to a preceding estate is, or is not, considered as a condition precedent, to give effect to the ulterior limitations, such cases may be distinguished into three classes. 1st, Limitations after a preceding estate which is made to depend on a contingency that never takes effect: 2dly, Limitations over upon a conditional contingent determination of a preceding estate, where such preceding estate never takes effect at all: 3dly, Limitations over upon the determination of a preceding estate by a contingency which, though such preceding estate takes effect, never happens.

§ 59. The

§ 59. The cases of *Napper v. Sanders*, and *Tracy v. Letbulier*, appear to fall under the first class in this distribution; in which cases it was held, that the contingency affected only that estate to which it was first annexed, without extending to the ulterior limitations.

§ 60. In a case referred by the Court of Chancery to the Court of King's Bench, the facts were—*Tempest Hey* devised all his real estates to trustees, to the use of his son *Thomas* for life, remainder to his first and other sons by any future wife in tail male, remainder to the daughter and daughters of such future wife and their heirs as tenants in common; provided that if his son should marry any woman related to his then wife, all and every the above uses, so far as the same related to the issue of such future marriage, should cease and be void; and the said trustees should stand seised of all the premises to the use of the children of his brother *John Hey* and their heirs as tenants in common. Soon after the death of the testator, *Thomas Hey* his son died without issue, and without having married again, leaving *Thomas Farren Hey* his heir at law.

Bradford v. Foley,
Doug. 53.

The question for the opinion of the court was, whether the children of *John Hey*, the brother of the testator, had taken any and what estate in the case that had happened?

The court certified their opinion, that the children of *John Hey*, the testator's brother, took estates tail under this devise. The court must therefore have

thought that the contingency of the son's marrying again, &c. was confined to the estates limited to his future issue.

Horton v.
Whitaker,
1 Term R.
346

§ 61. In another case referred by the Court of Chancery to the Court of King's Bench, the facts were—*Edward Busby*, reciting that he was desirous to provide for his sisters, but considering that his sister *M. S.* was already well provided for during the life of her husband, devised all his estates in the city of *Oxford*, &c. to trustees, in trust that they should, during the life of *M. S.* pay the rents and profits to the testator's sisters, *E. B.* and *M. B.*, their heirs and assigns; and from and after the decease of the husband of *M. S.*, in case *M. S.* should be then living, in trust, as to one third part, to the use of the said *M. S.* for her life, and as to another third part, to his sister *E. B.* for life, and as to the remaining third part, to his sister *M. B.* for life; with several remainders to their first and other sons in tail male, remainder to their daughters as tenants in common, with cross remainders between the sisters, remainder over to *J. S. Horton* in tail, with several remainders over. The testator's sister *M. S.* died in the life-time of her husband.

The principal question was, whether the condition of *M. S.*'s surviving her husband was merely confined to the life estate, or was to extend to all the subsequent limitations?

The court certified their opinion, that the remainder to *J. S. Horton* was good. They therefore must have held,

held, that the condition of the married sister's surviving her husband, did not extend to any of the limitations subsequent to her estate for life.

§ 62. The construction in these cases, as to the restriction of the contingency to the estate first hinged upon it, appears to depend on the testator's apparent intention not to extend it further: for, wherever there is no apparent distinction, in view, in this respect, between such estate and those that follow it, the contingency, it seems, will equally affect the whole ulterior train of limitations. Ferne, 358.

§ 63. *Thomas Hooker* devised his lands to his son *William Hooker*, and the heirs of his body; and if his said son should die without issue of his body, and the said testator's wife *Alice Hooker* should survive his the said testator's son, then the testator's wife *Alice* should enjoy the premises for her life; and after her decease, the premises should be enjoyed by the testator's sister *Mary Stratton* for her life, and after her decease, (the testator's son *William Hooker* being dead without issue as aforesaid), then the testator devised the premises to the lessor of the plaintiff. Davis v. Norton,
2 P. Wms.,
390.

The testator's wife *Alice* did not survive the testator's son, but died before him.

Upon a question, whether the ulterior devise over had not failed, by the wife's death in the son's lifetime? a case was made, by consent, for the determination of the judge who tried the cause, (*Reynolds*),

whose opinion was, that the remainder limited by the will was a contingent remainder, depending on the death of the son without issue, in the life-time of the testator's wife; and as that contingency never happened, the remainder, which depended thereon, could never arise. The judge appears to have laid much stress on the words, "the testator's son being then dead without issue as aforesaid," annexed to the remainder after the wife's decease, as equivalent to a repetition of the contingency first expressed of the son's dying without issue, the wife then living.

Doe v.
Shippard,
Doug. 75.

§ 64. Lands were devised to trustees upon trust out of the rents, to pay 20*l.* annually to the testator's daughter for life, and to pay the residue of the rents, and the whole after her decease, to her husband for his life; and if she should happen to survive her husband, then to stand seised of all the lands, upon the trusts after mentioned, *viz.* to his said daughter for life, then to her son *H.*, and the heirs of his body, remainder to the heirs of the body of her husband by her, remainder to the heirs of her body by any other husband, remainder to her husband and his heirs for ever. The testator's daughter died in the life-time of her husband.

It was held, that the limitations over should not take effect, for that the contingency was not confined to her life estate, but extended to all the subsequent limitations, the court not finding upon the whole will sufficient to gather a different intent, so as to warrant them in supplying the omitted words.

Mr. *Fearne* observes, that, in this case, the contingency itself was expressly, by the words of the will, extended to, and equally connected with, all the subsequent limitations; for the trustees were, in that event, to stand seised of the lands, to the several uses, intents, and purposes, in the will after mentioned: which uses included as well the limitations to the wife for life, as those following it; so that there was no particular connection of the condition with her estate more than with any of the rest.

§ 65. With respect to limitations over upon a conditional determination of a preceding estate, where such preceding estate never takes effect at all, the first case of this kind was upon a devise to trustees for 11 years, remainder to the first and other sons of *A.* successively in tail male, provided they should take the testator's surname: and, in case they or their heirs should refuse to take the testator's surname, or die without issue, then he devised his land to the first son of *B.* in tail male, provided he took his surname; and if he refused or died without issue, then to the right heirs of the devisor,

Scatterwood
v. Edge,
1 Salk. 229.

A. died without having had any son. *B.* had a son at the time of the devise. The court did not agree as to the validity of the devise to the first son after a term of years, without any preceding freehold to support it, but resolved that the subsequent limitation to the first son of *B.*, who was then *in esse*, and capable, took effect; and that the preceding limitation to the first son of *A.*, or the condition thereto annexed, did not operate as a

precedent condition, which *must* happen, to give effect to the subsequent limitation to the son of *B.*, but was only a precedent estate, attended with such a limitation.

§ 66. Lord *Hardwicke* was of the same opinion, and has said, “ I know no case of a remainder or
 “ conditional limitation over of a real estate, whether
 “ by way of particular estate, so as to leave a pro-
 “ per remainder, or to defeat an absolute fee before
 “ by a conditional limitation: but if the precedent
 “ limitation, by what means soever, is out of the case,
 “ the subsequent limitation takes place.”

§ 67. As most of the cases which occur upon this point, are cases wherein the whole fee was first limited, the further consideration of them will be postponed to *Executory Devises*; only observing, in this place, that if such a conditional limitation is not defeated by the failing of the preceding estate, in those cases wherein the whole estate is first limited, *a fortiori*, it should not be defeated, in the cases where the whole fee is not at first limited; but the remainder, though conditional, includes the residue of the estate, not before otherwise disposed of.

§ 68. As to cases of the third class, it may be observed, that although where a remainder is limited to take effect on a condition annexed to a preceding estate, and that preceding estate fails, it appears that the remainder shall nevertheless take place; yet, where such preceding particular estate takes place, and the condi-
 tion

tion is not performed, the remainder, it has been held, will not take effect at the expiration of such preceding estate, unless, in those cases, where the apparent general intention of the testator calls for it.

Vide Fearn, 362.

§ 69. It sometimes happens, that a remainder is limited in words which seem to import a contingency, though, in fact, they mean no more than would have been implied without them, or do not amount to a condition precedent, but only denote the time when the remainder is to vest in possession.

Adverbs of Time only denote the Period when a Remainder is to vest in Interest.

§ 70. *Thomas Boraston* devised lands to *A.* and *B.* for 8 years, remainder to his executors, until such time as *Hugh Boraston* should accomplish his full age of 21 years; and when the said *Hugh* should come to his age of 21 years, then the testator declared his will to be, that he should enjoy the same to him and his heirs for ever. *Hugh Boraston* died under 21. It was contended, that the remainder did not vest in him, because he did not live to attain the age of 21; for, as he was not to have it until 21, it was contingent on that event, it being uncertain whether he ever would attain that age. But it was resolved, that the case was no other in effect than a devise of lands by a person to executors, until his son attained the age of 21 years, remainder to his son in fee; and that the adverbs of time, *when*, &c. and *then*, &c. did not make any thing necessary to precede the settling of the remainder, any more than in the common case of a lease for life or years, and after the decease of the lessee, or the

Boraston's case, 3 Rep. 19.

end of the term, remainder to another; in which case, the remainder vests presently; for when these adverbs refer to a thing which must of necessity happen, they make no contingency; and it is certain that every man must die, and every term will end: so that these adverbs, *when* and *then*, are demonstrations of the time when the remainder shall take effect in possession, and not when the remainder shall vest.

1 P. Wms.
270.

Vide Fearn, 368.

Holcroft's
case,
Mo. 486.

§ 71. *A.* had two sons, *B.* and *C.*, and levied a fine to the use of himself for life, remainder to *B.* his eldest son for life, and, after, to the first son of the body of *B.* and his heirs male, and so to four sons successively in tail; and if it fortune the said fourth son to die without issue male, then to remain to *C.* *A.* dies. *B.* dies without issue male, leaving a daughter. Adjudged, that the use vests in *C.*, though *B.* had no issue male; and *B.*'s. having issue male, was no condition precedent.

Webb v.
Herring,
Cro. Ja. 416.

§ 72. Devise to “*A.* for life, then to *B.* in tail, “ and, if my three daughters, and either of them, “ overlive *A.* and *B.*, then they to have it, and, after “ them, I give it to *J. W.*,” &c. *B.* died, and two of the daughters died, living *A.*: then *A.* died. The question was, if this was a contingent estate; and, if so, whether it were performed by two of the daughters dying in the life-time of *B.*? And it was resolved, that it was no contingent limitation, but only shewed when it should commence, which was well enough performed.

§ 73. The

§ 73. The words of a devise were: “ *Item*, I give
 “ to my wife *Joan* all my houses and free lands for
 “ her life, and, after her death, to my three daugh-
 “ ters, equally to be divided, *viz.* to *Joan*, *Avice*,
 “ and *Alice*; and if any of them die before the other,
 “ then the others to be her heirs, equally to be di-
 “ vided; and if they all die without issue, then to three
 “ others named in the will,” &c.

King v.
 Rumball,
 Cro. Ja. 448.

Chadock v.
 Cowley,
 Cro. Ja. 695.

Adjudged by the whole court to be an estate tail.

§ 74. *Walter Thomas*, having four children, devised
 in these words: “ The house wherein *John Taylor*
 “ dwelleth, I give to my son *John*. *Item*, I bequeath
 “ to my daughter *Grace*, that part and interest that I
 “ have in the house at *Palace Gate*. *Item*, I give to
 “ my daughter *Elizabeth* that garden, &c. *Item*, I
 “ give to my son *William* all the houses which I have
 “ in *St. Martin’s Lane*. *Item*, my will is, that when
 “ either of my fore-mentioned children shall depart out
 “ of this life, that then the houses, lands, goods, and
 “ whatsoever I have now given them, shall be equally
 “ divided betwixt them that are living.”

Fortescue v.
 Abbot,
 Pollex. 479.
 T. Jones, 79.

The eldest son died, and it was contended, that this
 limitation over to the children then living, was a con-
 tingent remainder to the survivors, depending on the
 particular estates for life to the children; and that the
 eldest son’s estate for life, in the house devised to him,
 was merged in the fee which descended on him on
 his father’s decease, and, consequently, the contingent
 remainder

Anon.
2 Vent. 365.

remainder to the survivors in this house was thereby destroyed. But, on the other hand, it was insisted, and so adjudged by the court, that this was not a contingent, but a vested remainder; and that every child took a particular estate in his or her house for life, with a vested remainder to the others for their lives,

Goodtitle v.
Whitby,
1 Burr. 228.

§ 75. A person devised all his estates to trustees, in trust to lay out the rents and profits in the maintenance and education of the two sons of his sister during their minorities, and when and as they should respectively attain their ages of 21, then to the use and behoof of the said sons of his sister and their heirs.

Lord *Mansfield* said, the question was, whether the estate vested immediately in the two nephews upon the death of the testator, or remained in contingency till their respective coming of age.

8 Rep. 956.

He said he would lay down a rule or two of construction, previously to giving his particular opinion on this case:—1st, Whenever the whole property is devised, with a particular interest given out of it, it operates by way of exception out the absolute property, 2dly, Where an absolute property is given, and a particular interest is given in the mean time, as, “until the devisee shall come of age, &c. and when he shall come of age, &c. then to him, &c.” the rule is, that that shall not operate as a condition precedent, but as a description of the time when the remainderman is to take in possession. And to this purpose was

Boraston's

Boraston's case, where this doctrine was fully laid down and explained, Upon the whole, his Lordship held, that the nephews took an immediate gift, with a trust to be executed for their benefit, during their minority. Ante, f. 70.

§ 76. *Michael Lea* devised copyhold estates to *Thomas Lea* and *E. Johnson*, their heirs and assigns, to hold to them and their heirs, until *Michael Lea*, second son of his nephew *Thomas*, then an infant, should attain the age of 24 years, on condition that they should, out of the rents and profits, keep the buildings in repair. Item, he devised unto *Michael Lea*, his great nephew, and to his heirs and assigns for ever, *when and so soon as* he should attain his age of 24 years, the premises in question, and directed the trustees to surrender the premises accordingly. Doe v. Lea,
3 Term R.
41.

Michael Lea attained the age of 21, but died under 24 intestate, and without issue.

It was contended, that the words *when and so soon*, operated as a condition precedent to *Michael Lea's* taking any interest under the devise; and the event of his attaining the age of 21 not having happened, the condition was defeated, and consequently his heir at law could take nothing, these words having the same meaning as, "if *Michael Lea* shall attain the age of 24." And it was expressly determined to raise a condition precedent in the case of *Brownfords v. Edwards*. Tit. 38.

Lord

Lord *Kenyon* observed, that the words in *Brown-swords v. Edwards* were very different from the present: There it was, “*if* he should attain the age of 21;” but the words in this case only denoted the time when the beneficial interest was to accrue.

His Lordship cited *Boraston's* case, *Mansfield v. Dugard*, and *Goodtitle v. Whitby*, and concluded, that the words in this case could not operate as a condition precedent, but as giving an absolute interest in fee, and denoting the time when the remainder was to take effect in possession; and, therefore, that the estate descended to the heir at law of *Michael Lea*.

TITLE XVI.

REMAINDER.

CHAP. II.

*Of the Nature of the Event upon which a contingent
Remainder may be limited.*

- | | |
|---|--|
| <p>§ 2. <i>It must be a legal Act.</i>
 4. <i>It must be Potentia Propinqua.</i>
 9. <i>It must not be repugnant to
any Rule of Law.</i>
 10. <i>Nor contrariant in itself.</i></p> | <p>17. <i>It must not operate to abridge
the particular Estate.</i>
 29. <i>Of conditional Limitations.</i>
 35. <i>Estate may be enlarged on
Condition.</i></p> |
|---|--|

Section 1.

THE uncertainty of the event on which a remainder is limited, is the circumstance which makes it contingent. But a limitation intended as a contingent remainder may fail of effect on account of the following circumstances respecting the contingency upon which it is limited to take effect.

§ 2. First, the contingent event's being an illegal act, for Lord *Coke* says, “ the law will never adjudge
“ a grant good by reason of a possibility or expectation
“ of a thing which is against law ; for it is *potentia*
“ *remotissima et vana*, which, by intendment of law,
“ *nunquam venit in actum.*”

It must be
a legal Act.
2 Rep. 516.

§ 3. Hence it has been determined, that a limitation to a bastard is void. In a case, in 38 and 39 *Elizabeth*,
a man

Blodwell v.
Edwards,
1 Cro. 509.

a man made a feoffment to the use of himself for life, remainder to the use of such issue of the body of *Margaret Lloyd* as should, by common supposition, be adjudged to be begotten by the feoffor, whether legitimate or illegitimate. It was resolved, that the remainder was void, because the law doth not favor such a generation.

It must be
Potentia
Propinqua.

1 Inst. 25 b.
184 a.

2 Rep. 51 a.

§ 4. Secondly, the possibility upon which a remainder is to depend, must be a common possibility, or *potentia propinqua*; as death,^a or death without issue, or coverture: for, as the logicians say, *potentia est duplex, remota et propinqua*. Hence it has been determined, that a remainder to a corporation, which is not in being at the time of the limitation, is void, although such be erected afterwards, during the particular estate; for it was *potentia remota*.

1 Inst. 264 a.

§ 5. Differently, if, during the vacation of the mayoralty of *D.*, a lease for life be made, remainder to the mayor and commonalty of *D.*; the remainder is good, if there be a mayor of *D.* elected during the estate for life.

2 Rep. 51 b.

§ 6. It is laid down in *Cholmley's* case, that, if a lease be made for life, remainder to the right heirs of *J. S.*, this is good; for, by common possibility, *J. S.* may die during the life of the tenant for life: but if at the time of the limitation of the remainder, there be no such person as *J. S.*, but during the life of the tenant for life *J. S.* be born, and die, his heir shall at no time take; because (says Mr. *Fearne*) the possibility

Contin. Rem.
378.

ON

on which the remainder is to take effect is too remote, for it amounts to the concurrence of two several contingencies not independent and collateral, but the one requiring the previous existence of the other, and yet not necessarily arising out of it, *viz.* 1st. That such a person as J. S. should be born, which is very uncertain; and, 2dly, That he should also die during the particular estate, which is another uncertainty, grafted upon the former. This is called a possibility upon a possibility, which, Lord *Coke* says, is never admitted by intendment of law.

1 Inst. 25 b.
184 a.

§ 7. Upon the same ground, says Mr. *Fearne*, arises the distinction between a remainder limited by a general description, and one limited by a particular name to a person not *in esse*. In the first case, the remainder is good, as a limitation to the right heirs of J. D. who is alive, or *primogenito filio* of B., who has no son then born. But, in the other case, the remainder is void.

Cont. R. 378.

§ 8. A case is cited from the *Year Book*, 10 *Edw. 3.* in *Cholmley's* case, where, upon a fine levied to R., he granted and rendered the tenements to one J. and Florence his wife for their lives, remainder to G. son of J. in tail, the remainder to the right heirs of J.; and, in truth, at the time of the fine levied, J. had not any son named G., but, afterwards, he had a son named G., and died. In a *præcipe* against Florence, it was adjudged, that G. should not take the remainder in tail, because he was not born at the time of the fine levied, but

2 Rep. 51 b.

but long after. Wherefore another, who was right heir to J., by judgment of the court, was received.

This determination was founded on the principle, that the law would not expect that J. and F. should have a son so named, because it amounted to a possibility upon a possibility: 1st, that he should have a son; and, 2dly, That such son should be named G.

It must not
be repugnant
to any Rule
of Law.

6 Rep. 40 b.

4 Burr. R.
1941.

§ 9. It has been held, that a condition or limitation must determine or avoid the whole of the estate to which it is annexed, and not determine it in part only, and leave it good for the residue. Upon this principle, it has been adjudged, that a proviso to make the estate of tenant in tail cease during his life, was void; for, although the whole estate may be determined by a condition, yet part of it only, *viz.* during the life of the tenant in tail, shall not: in which instance, the proviso is ineffectual, on account of its repugnancy to a rule of law.

Nor contra-
rariant in itself.

§ 10. A condition may also be contrariant in itself, as in the case of a proviso for determining an estate tail, *as if tenant in tail were dead*. This has been held a contrariant proviso, and void on that account; because the death of tenant in tail does not determine the estate tail, but his *death without issue*: and, consequently, to say, that the estate shall determine as if he were dead, amounts to saying, that it shall determine as it would do upon an event; *viz.* the death of the tenant in tail, which event might *not* determine it;

it; and, therefore, such a proviso is contradictory and absurd in itself.

§ 11. *Thomas Cary* devised to *Peter Cary*, and the heirs males of his body, remainder in the same manner to his other sons, with a proviso, that if the said *Peter Cary*, or any of his other sons, or any of the heirs males of their bodies, should attempt or endeavour to sell, alien, bargain, discontinue, &c. the estate of such person so attempting, should cease and determine as if such person were naturally dead.

Jermyn v. Arscot,
1 Rep. 85 a.

It was held, that this proviso was void, as against law, and repugnant and contradictory: against law, because the whole estate ought to be defeated; repugnant, because an estate tail cannot be made to cease as if the tenant in tail was dead; for the death of a tenant in tail does not determine an estate tail, but his death without issue.

§ 12. Sir *Richard Cholmley*, by a conveyance to uses, limited his estate to the use of *Francis Cholmley* for life, remainder to the use of *Henry Cholmley*, and the heirs male of his body, with divers remainders over; with a proviso, that if the said *Henry*, or any of the heirs male of his body, should attempt or make any feoffment, his estate should cease as if he were dead. The proviso was held to be void, as illegal.

Cholmley v. Humble,
1 Rep. 86 a.

§ 13. *S. Corbet* covenanted to stand seised to the use of himself for life, remainder to his eldest son *Rowland*, and the heirs of his body, with a proviso, that if the

Corbet's case,
1 Rep. 83 b.

saïd *Rowland*, or any of the heirs male of his body, should be resolved and determined, or advisedly should attempt or procure any act or thing concerning any alienation of the saïd premises, by which any estate tail thereof should be barred, that the estate to him limited should cease, only in respect to such person so attempting to alien, in the same manner as if such person was naturally dead.

After the death of *C. Corbet*, his son *Rowland* entered, and suffered a common recovery; and the person in remainder having entered on the breach of the proviso, it was determined, that the proviso was repugnant, impossible, and against law; for the death of a tenant in tail is not a determination of the estate tail, but his death without issue.

Mildmay's
case,
6 Rep. 40.

So, where a proviso, similar to that in the last case, was inserted in a deed, “ it was resolved, that it was
“ impossible, and repugnant, that an estate tail should
“ cease as if the tenant in tail was dead, (had he issue
“ or not), for an estate tail cannot cease, so long as suc-
“ cessive heirs continue: but here, his intent was to
“ continue the estate tail, and to cease it in respect of
“ the party offending only, and not as to any other;
“ which was impossible, repugnant, and against law;
“ for every limitation or condition ought to defeat the
“ whole estate, and not to defeat part of the estate,
“ and leave part not defeated; and it could not make
“ an estate to cease *quoad unam personam* and not *quoad*
“ *alteram*.”

§ 14. So, where a person devised his estate to *H. K.* and the heirs male of his body, until such time as the said *H. K.*, or any issue male of his body, should effectually and expressly assent, conclude, do, or go about to do, or make any act or acts, to alter, discontinue, or change his estate tail. *H. K.* and his son levied a fine of the estate. The court resolved, “ that this was
 “ a perpetuity in our law books, and repugnant to the
 “ law, and not allowable ; for he may not determine
 “ an estate tail by such a limitation, nor can he give
 “ title to another to enter, who is a stranger ; for, by
 “ the fine, there was a discontinuance of the remain-
 “ der, and a divesting thereof, so as he could not enter :
 “ for it was no limitation to enter, but after the effec-
 “ tual going about, and it was not effectual until the
 “ act was done ; and, when the act was done, the re-
 “ mainder was discontinued, and then he could not
 “ enter. Also they held these were uncertain, ambi-
 “ guous, and inadequate words, to make the limita-
 “ tion of an inheritance by the determination thereof,
 “ and therefore void and repugnant to law ; and the
 “ law would never give allowance to it ; wherefore
 “ they held, that the case was all one with the reasons
 “ in the cases of *Sir A. Mildmay*, *Corbet’s case*,” &c.

Foy v. Hindc.
Cro. Ja. 697.

Vide Fearn,
Cont. R. 383.

§ 15. It has been stated in Title 13., *Condition*, that there are certain incidents and qualities so annexed to, and inherent in certain estates, that they cannot be restrained or prohibited by any proviso, condition, or limitation ; and, therefore, when an estate is limited to take effect upon any such restrictive condition annexed

Ch. i. f. 21.

to a preceding estate, such limitation is held to be void, and incapable of taking effect at all.

Ch. i. f. 26.

§ 16. It has therefore been determined, that a proviso annexed to an estate tail, that if the tenant suffered a recovery, the estate tail should entirely cease, as if the tenant were dead without heirs of his body, was void. But it has been stated, in Title 13., *Condition*, that a tenant in tail may be restrained from making a feoffment, or levying a fine at common law.

It must not operate to abridge the particular Estate.

Ante, ch. i. f. 3.

§ 17. The event or contingency on which a remainder is limited, must not operate so as to abridge, defeat, or determine the particular estate. This rule flows, of necessity, from the nature of a remainder, as exhibited in the definition of it by Lord *Coke*. So that it is of the essence of a remainder, that it should wait for, and only take effect in possession, on the natural expiration or determination of the first estate.

Tit. 13. ch. 2. f. 50.

§ 18. This rule also follows, as the consequence of a maxim at common law, that none shall take advantage of a condition but the party from whom the condition moves, (*i. e.* the grantor), and his heirs; for, if he or his heirs take advantage of a condition, by entry or claim, the livery made upon the creation of the estates is defeated, and, of course, every estate then created, is thereby annulled and gone. But the remainder ought to vest at the instant of the expiration of the preceding estate, and remainders are defeated by the entry of the grantor; therefore, such remainder is void.

It

It follows, that a remainder, properly so called, cannot be limited to take effect upon a condition, which is to defeat the particular estate, whether such condition be repugnant to the nature of the estate to which it is annexed, or not.

§ 19. If, therefore, a lease for life be made upon condition, that if a stranger pay to the lessor 20 l., then *immediately* the land shall remain to the same stranger; this remainder, it seems, is void; for the tenant for life ought to have it during his life; and, if so, during that time the stranger cannot have it: for he can take no advantage of the condition, but only the grantor or his heirs. But, had it been limited, that if a stranger pay to the lessor 20 l., then *after the death of the tenant for life*, it should remain to that stranger, it would have been a good remainder.

Plow. 29 B.
2 Leon. 16.

The distinction between the two cases is this: in the latter, the remainder is not to vest in *possession* till after the determination of the estate for life, when it may vest of course. In the former, it is limited to take effect in possession, on the performance of a condition, which is to defeat the estate for life, and not to wait till the particular estate be determined, by means consistent with the nature of its original limitation.

§ 20. If a lease be made to two, the remainder over in fee, after the death of the first of them, this remainder is void; because, as the survivor must have the lands for life, by the nature of the first estate, the li-

Plow. 24.

mitation over after the death of the first of them, cannot take place, without defeating the first estate, as to the interest of the survivor.

Vide Sayer
v. Hardy,
Cro. Eliz.
414.

§ 21. Upon the same principles, it seems, that if an estate be granted to *A.*, a widow for life, remainder to *B.* in fee, on condition that *A.* continues a widow; if *A.* marries, the entry of the heir defeats the estate to *A.*, and to *B.* also; but that, if an estate had been granted to *A.* *durante viduitate*, remainder to *B.*, upon *A.*'s marriage, her estate would determine by the nature of its limitation, and the remainder to *B.* would take effect.

Vide Fearn, 363.

This doctrine must, however, be understood of estates at common law; for dispositions by devise, in the event of a second marriage, may be construed according to the apparent intent.

Vide Ante,
ch. I.

§ 22. Here, however, we are to observe, that if land be leased to one for life, &c. and if such a thing happen, then to remain to *B.*, &c. this shall not be understood, as intended to vest in possession immediately upon the happening of the condition, and in abridgment of the preceding estate; because, under that construction, the remainder would be void, for the reasons already given; but it shall be construed to vest in *interest* upon the happening of the condition, and to remain as a remainder ought to do, that is, so as to await the determination of the preceding estate, before it comes into possession.

§ 23. Land

§ 23. Lands were limited to husband and wife for their lives, remainder to *A.* their son for life, and, if he should die in the life-time of the husband and wife, that then the lands should remain to *B.* another of their sons for life; it was resolved, that the remainder limited to *B.* was good, and that the words, “if *A.* should die in the life-time of the husband and wife, then the lands should remain to *B.*,” did not operate to defeat the estate limited to the husband and wife, but only indicated the time when the remainder should become vested in interest.

Colthirst v.
Bejushin,
Plow. 23.
4 Reev. 509.

§ 24. The same law holds with regard to a subsequent remainder limited to take effect on a condition which is to defeat a preceding remainder.

§ 25. *A.* being seised in fee, leased to *B.* for life, remainder to *C.* for life, provided, that if *A.* should have a son which should live to the age of five years, the estate limited to *C.* should cease, and the land remain to that son in tail.

Cogan v.
Cogan,
Cro. Eliz.
360.

It was determined, that the estate limited to the son was void, because it depended on a condition which operated to defeat the preceding remainder.

§ 26. It may happen, that, notwithstanding a contingent limitation is *expressed* to commence from a period eventually anterior to the determination of the particular estate, yet the nature of the case may be such as not to admit of its taking effect in possession, in restraint, abridgment, or exclusion of the particular estate; as if

Infra.

Ferne, 397.

such limitation over, were to the grantee or devisee of the particular estate, which, instead of operating in any degree to defeat, exclude, or curtail the particular estate, would, in effect, remove its limits, and expand it into a greater estate. This is but in conformity to what was allowable at common law, in regard to the enlargement of estates on condition; which limitations so far resemble contingent remainders, as to require the continuance of the particular estate till they are vested. And although the limitation should not so far approach the particular estate *in quality*, as to come within the doctrine of estates to be enlarged on condition, yet, if it be such as cannot defeat, exclude, or abridge the particular estate, nor have any other operation, than if the words *expressive of its time of commencement* had been omitted, or if it had been in express words postponed *till after* the determination of the preceding estates, the objection to its effect as a *remainder* does not hold; as it then, in effect, gives no more than the *remnant* or *residue*, expectant on the particular estate, and could not have entitled the grantor or his heir to enter at common law, in defeazance of the particular estate; nor operates at all to the prejudice of strangers; which are the reasons assigned against the validity of conditional limitations at common law.

§ 27. Thus, suppose in the case of a lease to two, as in a former case, sect. 20., the limitation over, after the death of the first of them, had been to the survivor instead of a stranger, this would not have avoided, defeated, or abridged the estate of the survivor, but actually have embraced it, in the afflux of a greater,
into

into which it would have run under the technical term of merging, instead of being rescinded or nullified. The grantor or his heir could have no title to enter and defeat the particular estate, because there was no condition or proviso to make it cease, or carry the estate either expressly or implicatively to any body, from the devisee of the particular estate. Nor could the limitation operate to the prejudice of another, *viz.* the person otherwise entitled to the particular estate; because it was to that very person himself; and the effect would have been precisely the same, if the limitation had been, and from and after the determination of the estate aforesaid, to the survivor in fee. Nothing would, therefore, in that case, have prevented the limitation over from operating strictly as a remainder at common law.

§ 28. A person devised unto his wife *Elizabeth*, and his daughter *Ann*, all that his messuage, &c. to hold unto his said wife and daughter for and during the term of their natural lives, and the life of the longer liver of them in equal proportions, share and share alike, and then proceeded in these words: “ But in
“ case my said daughter *Ann* should happen to marry
“ and have issue of her body lawfully begotten, then
“ and in that case, after the decease of my said wife,
“ I give and devise all the said messuage, &c. unto my
“ said daughter *Ann*, and to her heirs and assigns for
“ ever; but if my said daughter should happen to die
“ single and unmarried, and without issue of her body
“ lawfully begotten, then and in such case, I give and
“ devise the said premises unto my said wife *Elizabeth*,
“ and to her heirs and assigns for ever.” The testator
died

Goodtitle v.
Billington,
Doug. 753.

died in 1774, leaving *Elizabeth* his widow, and *Ann* his daughter, who was his heir at law. *Elizabeth* died in 1775. After her death, *Ann* suffered a recovery of the estate, and devised it to the defendant, and died unmarried. The heir of *Elizabeth* brought an ejectment against the devisee of *Ann*.

Lord *Mansfield*.—"It is perfectly clear and settled, that where an estate can take effect as a remainder, it shall never be construed to be an executory devise, or springing use. Here the first limitation is to two persons and the survivor, so that a preceding freehold will be in the survivor; and' the estate over is limited on a contingency upon which a remainder may depend. It is to the daughter and her heirs, (not issue) if she should marry and have issue; and it must have taken effect after the death of the survivor. There is another contingency on the event of the daughter dying unmarried, and without issue, (not on failure of her issue), and, upon that event, the remainder is to the widow in fee."

It was resolved, that the estate devised to *Ann*, in case she should marry, and have issue, was a contingent remainder.

Of conditional Limitations.

Ch. i. s. 15.

§ 29. It has been shewn in Title 13. *Estate upon Condition*, that a condition must avoid or determine the whole estate to which it is annexed; and that the benefit of a condition can only be reserved to the donor and his heirs, and not to a stranger. In consequence of this doctrine, no remainder could be limited

limited on a condition: 1st, Because such condition would operate so as to abridge the particular estate; 2dly, Because the entry of the donor for the condition broken would defeat the remainder.

1 Roll. Ab.
472. 474.
Ferne Cont.
Rem. 405.

§ 30. It has, however, been long settled, that where, in a devise, a condition is annexed to a preceding estate, and upon the breach or non-performance thereof the estate is devised over to another, the condition shall operate as a limitation circumscribing the measure and continuance of the first estate; and that upon the breach or performance of it, as the case may be, the first estate shall *ipso facto* determine and expire, without entry or claim; and the limitation over shall thereupon actually commence in possession; and the person claiming under it, whether heir or stranger, shall have an immediate right to the estate. Thus is the testator's intention effectuated by substantiating the subsequent estate, though limited to a stranger, and enforcing the performance of the condition by the determination of the preceding estate upon the breach of it, notwithstanding that preceding estate be limited to the heir himself: and limitations of this kind are properly called *conditional limitations*.

Id. 407.

§ 31. Thus, where a person devised lands to his mother for life, and after her death to his brother in fee; provided that if his wife (being then with child) be delivered of a son, that then the land should remain to him in fee. After the testator's death, a son was born; and it was held, that the fee of the brother should

Dyer, 127a. n.
Id. 33a. n.
Cro. Ja. 592.

should cease and vest in the son, upon the happening of the contingency.

Lady Ann
Fry's case,
1 Vent. 199.

§ 32. *A.* devised lands to his wife for life, and after her death to his grand-child *B.* and the heirs of her body; provided always, and upon condition, that she married with the consent of *D.* *E.* and *F.* or the major part of them; and in case she should marry without such consent, or die without issue, then he devised the premises to *C.*, (neither *B.* nor *C.* being heir to the testator). After the testator's death, *B.* married without the consent of any of the persons named for that purpose.

It was clearly held to be an estate to *B.* till she married without such consent: that here was an estate tail devised to *B.*, subject to two limitations—the one in law, *viz.* dying without issue; the other express and in fact, *viz.* marrying without such consent; which was properly a conditional limitation, and not a condition; for if it were a condition, it would descend to the heir at law, and he might enter for breach of it, and defeat the limitation over; and it was therefore agreed, that the marriage without consent determined her estate tail, and cast the possession immediately on *C.*

Shuttleworth
v. Barber,
3 Mod. 7.

§ 33. A person devised lands to *A.*, his heir at law, and other lands to *B.* in fee; and that if *A.* molested *B.* by suit or otherwise, he should lose what was devised to him, and it should go to *B.* After the testator's death, *A.* entered on the lands devised to *B.*, and claimed them.

It was held, that this was a sufficient breach to give title to *B.*, and that the condition imposed on the heir should not be taken as a condition; because, if so, by descending on him who alone could enter for the breach of it, it would, in this case, be fruitless and defeated: but it was held to be a *limitation*, which determined the heir's estate; and cast the possession on *B.* without entry.

§ 34. But where there is no express limitation over, to take effect upon the breach or non-performance of the condition annexed to the preceding estate; there, it seems, the condition or proviso is not always construed as a conditional limitation.

Gulliver v. Ashby, Fearn Ex. Dev. 60.

§ 35. There is a limitation of another kind, which may be considered as an exception to the rule at common law, that an estate limited to take effect on a condition which is to affect the particular estate is void. I mean those cases where a particular estate is limited, with a condition, that after the performance of a certain act, or the happening of a certain event, the person to whom the first estate is limited shall have a larger estate. For it was resolved, in the case of Lord *Stafford*, that such a grant may be good, as well of things which lie *in grant*, as of things which lie *in livery*; and may be annexed as well to an estate tail, which cannot be drowned, as to an estate for life or years, which may be merged by the access of a greater estate. But that such increase of an estate by force of such a condition ought to have four incidents.

Estates may be enlarged on Condition.

Fearn Cont. Rem. 420. 4th edit.

8 Rep. 74.

1st, There

1st, There ought to be a particular estate as a foundation for the increase to take effect upon; which particular estate Lord Coke held must not be an estate at will, nor revocable, nor contingent.

2dly, Such particular estate ought to continue in the lessee or grantee until the increase happens, without any alteration of privity in estate by alienation of the lessee or grantee, though the alienation of the lessor or grantor will not at all affect it; and the alterations of persons, by descent of the reversion to the heirs of the grantor or his alienee, or of the particular estate to the representatives of the grantee, shall not avoid the condition; and where the grantee dies before performance of the condition, his heir shall, after he has performed the condition, be in *quodam modo* by descent; and such increase need not take place immediately upon the particular estate, but may enure as a mediate remainder, subsequent to an intermediate remainder for life, or in tail to somebody else.

3dly. That the increase must vest and take effect immediately upon the performance of the condition; for if an estate cannot be enlarged at the very instant of time appointed for enlargement, the enlargement shall never take place; and therefore though the reversion be in the king, it shall instantly be out of him upon performance of the condition, and vest in the grantee, without petition or *monstrans de droit*, or other circumstance; for the awaiting such circumstances would frustrate and defeat the enlargement, and the

law will never require circumstances to subvert the substance.

4thly, The particular estate and the increase ought to take effect by one and the same instrument or deed, or by several deeds delivered at one and the same time, (which in effect is the same thing, for *quæ incontinenti fiunt inesse videntur*); because the particular estate and the increase thereupon, is only a grant to take effect out of one and the same root; and though the increase vest at a different time, yet when it is vested, it has its force and effect from the same grant.

In *Shepherd's Touchstone*, 129. another incident is mentioned, namely, that the condition be possible and lawful.

TITLE XVI.

REMAINDER.

CHAP. III.

Of the Estate necessary to support a Contingent Remainder.

- | | |
|---|---|
| <p>§ 1. <i>It must be a Freehold.</i></p> <p>11. <i>A Contingent Remainder for Years does not require a Freehold.</i></p> <p>13. <i>A Right of Entry is sufficient.</i></p> | <p>18. <i>It must be a present Right.</i></p> <p>20. <i>Where the legal Estate is in Trustees, there need no preceding Estate.</i></p> <p>23. <i>Both Estates must be created by the same Instrument.</i></p> |
|---|---|

Section. I

It must be a Freehold.

Fearne, 423.

IT is a general rule, that whenever an estate in contingent remainder amounts to a freehold, some vested estate of freehold must precede it: this rule arises from the necessity there is for the freehold to pass out of the grantor at the time the remainder is created. If no freehold passes, how is the remainder man to have it? If it passes at all, it must pass either in the particular estate, or in some remainder limited after it. In a contingent remainder it cannot pass, because such remainder, at the time of its creation, passeth to, or vests in nobody; and if it passeth only in some vested remainder limited after the contingent remainder, then is such contingent estate precluded from ever rising at all; for that freehold then becomes vested in possession which the contingent estate was limited to precede, and, of course, there is no room left for the introduction

tion of the contingent freehold : it follows, therefore, that some preceding vested estate of freehold must be limited, to give existence to such contingent remainder.

§ 2. A person devised lands to his son *John* for 50 years, if he should so long live ; and as for my inheritance after the said term, I devise the same to the heirs male of the body of *John*. The court held this devise to the heirs male of the body of *John* to be void, as a remainder, for want of an estate of freehold to support it.

Goodright v. Cornish,
1 Salk. 226.

Scatterwood v. Edge,
Ante, ch. 1.

§ 3. But where an estate was limited to the use of the settlor for 99 years, if he should so long live, remainder to trustees and their heirs during his life, remainder to the use of the heirs of his body, &c. ; it was held, that the contingent remainder to the heirs of the body of the settlor was good, because it was preceded by a vested freehold remainder, to the trustees.

Elie v. Osborne,
2 Vern. 754.
1 P. Wms. 387.

Vide Doe v. Morgan,
Infra.
Vide Fearn,
424.

§ 4. There is a case reported by *Moore*, where *A.* covenanted to stand seised to the use of himself for life, remainder to *B.* his brother's eldest son for life, remainder to the first son of *B.* in tail, and so on to his eighth son, remainder to the right heirs of *A.* *A.* was afterwards attainted of treason, and executed before the birth of any son of *B.* And it was resolved that, by the attainder of *A.*, the after-born sons of *B.* were barred, and that the Crown had the fee-simple, discharged of all the remainders limited to sons, not then born.

Sir T. Palmer's case,
Mo. 815.

Infra, ch. 5.

Tit. 11. c. 3.
s. 10.

§ 5. Mr. *Fearne* observes, that it is extremely difficult to reconcile this resolution with the principle, that any preceding vested freehold estate will support a contingent remainder: for here, whatever effect the forfeiture of *A*'s. estate for life, and remainder in fee, might otherwise have had, yet, as *B.* had a vested freehold, why was not that capable of supporting the contingent remainder to his sons? There are no reasons given for the resolution in this case, and, perhaps, to account for it, we are to recur to the supposed necessity of a seisin in the feoffee's covenantees, &c. to serve contingent uses, when they come *in esse*; which principle admitted, it might be inferred, as it seems agreed that the crown cannot stand seised to a use, that there could be no seisin, after *A*'s. forfeiture to the crown to serve the contingent uses to *B*'s. sons when they came *in esse*, and that, on that account, they could never take effect.

If there had been an office found, antecedent to the birth of a son of *B.*, that *A.* was seised in fee, it might have accounted for the resolution in the above case, by taking away the right of entry of *B.*, according to a distinction which will be noticed in a subsequent case.

§ 6. The determination in Sir *T. Palmer*'s case is, however, contradicted by the two following cases.

Corbet v.
Tichburn,
Salk. 576.

J. S. was tenant for life, remainder to his wife for life, remainder to his first and other sons in tail, remainder

remainder to the right heirs of J. S. The said J. S. committed treason, and then had a son, and afterwards was attainted; and the court held, that whether the son was born before or after the attainder, the contingent remainder to him was not discharged by the vesting in the crown during the life of J. S., because of the wife's estate, which was sufficient to support it.

§ 7. Tenant for life, remainder to his first son in tail, remainder to J. S. in fee: the tenant for life is attainted of treason, and dies without issue. It was objected, that the whole estate being vested in the king, by 33 Hen. 8., without any office finding the special matter, the person in reversion could not enter, for the statute vested it in the king like a general office; and if a general office had been found, it would have supposed a fee.

Linch v.
Coote,
Salk. 469.

Lord Holt observed, that no other estate vested in the king, by virtue of the act of parliament, than the party attainted had; just as if a special office had been found: and, therefore, in this case, as in that, the remainder man might enter on the king, his estate being determined, for the statute saved the rights of others. Otherwise, where an office finds an estate in fee in the party attainted; for, then, it must be avoided by traverse, or *amoveas manum*.

§ 8. It has been stated, that where there is a limitation to a person for 99 years, if he shall so long live, with a remainder over to a person *in esse*, such remainder

Ch. i.

Cont. Rem.
24.

der is considered as vested. But Mr. *Fearne* observes, that in this sort of limitations, (when not by will or by way of use), if the term of years is so short, as to leave a common possibility that the life on which it is determinable may exceed it, there should be a present vested freehold estate, to prevent the limitation over being void, as a freehold to commence *in futuro*.

Ch. i.

In both the cases of Lord *Derby* and *Napper v. Saunders*, a preceding freehold being limited to the feoffees, left no room for this objection. But the case put by Lord *Hale*, stands independent of any preceding freehold; and, though it seems capable of being supported, upon the principle of a preceding freehold arising by implication, yet there seems to be no occasion for such a resort; because the allowed improbability of the life's exceeding the term of years determinable thereon, appears sufficient to take such remainders, as those in Lord *Derby's* case, and *Napper v. Saunders*, and the case put by *Hale*, out of the description of freeholds to commence *in futuro*.

Cont. Rem.
25.

3 Rep. 20.

§ 9. It is generally true, (says Mr. *Fearne*), that, in the case of a limitation to *A.* for 21 years, if he shall so long live, and, after his death, to *B.* in fee, the remainder to *B.* is void, as being a freehold to commence *in futuro*, viz. after the decease of *A.*, no freehold having been limited so as to take effect before that period: because, in this case, it is very possible, that the period limited for the remainder to take effect from, viz. the decease of *A.*, may not happen till after the

the determination of the preceding estate, *viz.* the term of years; in which event, the remainder could not take effect at all, as has been already observed in a preceding page. Its taking effect is therefore uncertain, in regard of this possibility of the preceding estate's determining before the event happens, from whence the remainder is to commence; and, should it take effect at all, it must be *in futuro*, that is, after the event is decided on which its taking effect depends. Here, then, being no preceding freehold limited, this remainder (which must take effect at some future period, if at all,) is strictly nothing else than a freehold limited to commence *in futuro*.

§ 10. It is the allowed common possibility of the life's exceeding the term, which creates such a contingency in respect to the remainder's taking effect, as brings that remainder within the description of a freehold limited to commence *in futuro*, and, consequently, within the direct application of the rule, which denies any effect to limitations of that kind.

Vide Ch. 1.

§ 11. As to a contingent remainder for years, there does not appear to be any necessity for a preceding freehold to support it, for the remainder not being freehold, no such estate appears requisite to pass out of the grantor, in order to give due effect to a remainder of that sort.

A Contingent Remainder for Years does not require a Freehold.

Fearne, 429.

§ 12. *Frances Duchess of Richmond*, demised certain lands to *John Lord Paulet* and others, to hold from

Corbet v. Stone, Raym. 140.

from thenceforth for 40 years, if she lived so long, in trust that she might receive the profits during her life ; and after her decease, then one moiety thereof to *Mary Clarke*, and the other moiety to *Joan Brooke*, their executors, administrators, and assigns, for and during the term of 1000 years from the death of the said *Frances*.

The court doubted that the remainder to *Mary Clarke* and *Joan Brooke* was void, because, 1st, It could not pass to them by way of present estate, because they were not parties to the deed : 2d, It could not be a contingent remainder, being a remainder for years depending on an estate for years ; and there could not be a contingent estate for years, because a lease for years operated by way of contract, and therefore the particular estate, and the remainder, operated as two distinct estates, grounded upon several contracts.

430.

Mr. Fearne observes, that this opinion seems not to be well considered ; and that the court did not appear to rely upon it, when they said, that, admitting the term of 1000 years was a contingent remainder, it was barred by a fine and con-claim after the time of vesting,

A Right of
Entry is
sufficient.

Fearne, 430.

§ 13. Although every contingent freehold remainder must be supported by a preceding freehold, yet it is not necessary that such preceding estate continue in the actual seisin of its rightful tenant ; it is sufficient, if there subsists a right to such preceding estate, at the time

time the remainder should vest, provided such right be a right of entry, and not a right of action only; for, whilst a right of entry remains, there can be no doubt that the same estate continues, since the right of entry can exist only in consequence of the existence of the estate: but when the right of entry is gone, and nothing but a right of action remains, it then becomes a question of law, whether the same estate continues or not; for the action is nothing more than the means of deciding the question. Another estate is, in the meantime, acknowledged and protected by the law, till such question be solemnly determined in a court of justice, upon the action brought.

§ 14. If *A.* be tenant for life, with a contingent remainder over, and tenant for life be disseised, all the estates are divested; but the right of entry of the tenant for life will support the contingent remainders.

Fearne, 431.
1 Rep. 66 b.
67 a.

§ 15. If, however, in a case of this kind the contingent remainder does not vest before such descent be cast, as will take away the entry of tenant for life within the statute 32 Hen. 8. c. 33. and drive him to his action, then is the contingent remainder gone; because there no longer subsists any right of entry to support it, that right being turned into a right of action.

Id.

1 Ld. Raym.
316.

§ 16. It has been stated in Title 2. that a tenant in tail may alienate his estate by certain modes of conveyance, so as to take away the entry of the issue in tail,

Ch. 2. f. 14.

tail, and drive him to his action, which is called a *discontinuance*; from which it follows, that where a contingent remainder is limited after an estate tail, and the tenant in tail creates a discontinuance, the contingent remainder will be destroyed.

1 Rep. 135 b.

§ 17. In *Chudleigh's* case, Baron *Clark* put the case in 11 *Rich.* 2. A gift in tail was made to *A. C.*, the remainder to the right heirs of *A. S.* The donee made a feoffment to *B.* in fee, and afterwards *A. S.* died. His right heir shall never have the remainder; for the estate of the land was by the feoffment of the tenant in tail divested and discontinued; and there was not any particular estate *in esse* or in right to support the remainder; for, by the feoffment of the tenant in tail, his right was utterly gone. But if tenant in tail was disseised, and died, that would not destroy the remainder; for there a right of the particular estate remained to support the right of the remainder; but when the tenant in tail made a feoffment, no right remained in him,

It must be
a present
Right.

Fearne, 433.

§ 18. This right of entry to support a contingent remainder, must be a present right; a future one will not do: it must also precede the contingency, and be actually existing when that happens; for if it only commences at the same instant with it, the remainder, it seems, will not vest.

§ 19. A right of entry only will not support a contingent remainder limited by way of use, but there must be

be an actual entry; of which the reason will be explained in a subsequent chapter.

§ 20. Where the legal estate is devised to and vested in trustees, in trust, there is no necessity for any preceding particular estate of freehold to support contingent remainders; for the legal estate in the general trustees will be sufficient for the purpose.

Where the legal Estate is in Trustees, there need no preceding Estate.

§ 21. Thus, in a case which has been already stated, it was held by Lord *Hardwicke*, that if the limitation to *Joseph's* children was a contingent remainder, the legal estate in the trustees would support it.

Chapman v. Blissett, Tit. 12. ch. 1. f. 16.

§ 22. *A.* devised to the use of trustees and their heirs, in trust for *B.* for life, remainder to his first and other sons successively in tail, remainder to the future sons of *C.* successively for life, remainder over. *B.* died without issue in the testator's life-time. The contingent limitations were taken as executory devises, because no child was then born to *C.* Afterwards a child was born to *C.* and died, and a subsequent remainder-man claimed the estate, upon a supposition that all the preceding intermediate limitations, which could not vest at the death of such child, were destroyed: as it had been decreed, that upon the vesting of the executory devise in that child, the subsequent limitations became contingent remainders upon that executory devise. But it was held, that the inheritance in the trustees was sufficient to support the intermediate contingent remainders till they should come *in esse*, although there was

Hopkins v. Hopkins, Forrest. 44. 1 Ves. 268. 1 Atk. 581.

no particular estate to support them: and that the estate should not vest in possession, whilst an object of any preceding limitation might come *in esse*.

Both Estates must be created by the same Instrument.

Fearne, 446.

§ 23. The estate supporting and the remainder supported should both be created by one and the same deed or instrument; therefore an estate for life, given by one deed, will not support a remainder given by another; nor an estate for life, settled by *A.* on *B.* by deed, enure to support a contingent remainder given by the will of *A.*

Snow v. Cutler, Raym. 162.

§ 24. A woman, being tenant for life, her husband devised the same estate to the heirs of her body, if they attained fourteen years. The court held, that this was no remainder, but an executory devise; for though the wife had a preceding estate for life, yet this was a new devise, to take effect after her decease, and was not a remainder joined to a particular estate.

Moor v. Parker, 4 Mod. 316.

§ 25. *A.* being tenant for life by marriage settlement, remainder to his wife for life, remainder to his first and other sons by that marriage in tail male. His father, the reversioner, by his will, after reciting the settlement, devised the lands to the first and other sons of *A.* according to the settlement; then if *A.* should die without issue of that marriage, he devised to the first and other sons of *A.* by any other wife in tail male; and if *A.* should *die without issue*, then he devised that all the land should go to his grand-children by his daughter *P.* in fee. It was contended, that *A.* took

Tit. 38.

an

an estate tail under this will by implication, and of course the remainder over in fee was well supported. But the court held it was impossible to make this an estate tail in *A.*, for nothing was given him by the devise, so that he had only the estate which he took under the first settlement. That there being two several conveyances, the devise could not be tacked to the estate for life, which was limited by another conveyance, even admitting that the word issue could be an implication of an estate to the heirs of the body of *A.*

§ 26. A person made a feoffment to the use of himself for life, and after the death of *A.* and *M.* his wife, to the use of *B.* (eldest son of *A.*) for his life. This was held to be a contingent remainder in *B.*, being created by the same deed as the particular estate. But though it did not appear in the case, yet it afterwards appearing upon examination that, by a former deed, *M.* had an estate for life, Lord *Hale* said the remainder should not be contingent; but the mentioning that the commencement thereof should be after the death of *M.*, was only expressing when *B.* should take the profits in possession, and did not make a contingency; this not being a remainder created by that deed, but a conveyance of the then subsisting reversion or remainder expectant on the death of *M.*

Weale v.
Lower,
Pollex. 66.

§ 27. In a modern case, where a person having granted an estate to his eldest son for his life, afterwards by his will reciting that he had settled that estate upon his eldest son for his life, proceeded in these words:—

Doe v.
Fonnereau,
Doug. 486

“ My

“ My will is, and I do hereby, from and after his de-
“ cease, give and devise the same to the heirs male of
“ his body begotten ; and in default of such issue, to
“ the use and behoof of my second, third, fourth, and
“ fifth sons, severally, successively, and in remainder,
“ and of the several heirs male of the body of my said
“ sons,” &c.

The court held that the limitation to the heirs male of the body of the eldest son was not a contingent remainder.

TITLE XVI.

REMAINDER.

CHAP. IV.

Of the Time when a Contingent Remainder should vest.

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| <p>§ 1. <i>A Contingent Remainder must vest during the Continuance of the particular Estate.</i></p> <p>7. <i>A vested Remainder may take effect, though the preceding Estate be defeated.</i></p> <p>9. <i>Posthumous Children take as if born.</i></p> | <p>15. <i>A Remainder may vest at the Instant the particular Estate determines.</i></p> <p>18. <i>A Remainder may fail as to one, and take effect as to another.</i></p> <p>21. <i>A Remainder may take effect in some, though not in all.</i></p> |
|--|--|

Section 1.

WE are now to consider the time at which it is requisite a contingent remainder should vest in interest, that is, at what period, with respect to the duration of the preceding estate, the contingency upon which such remainder is limited to take effect, ought to happen.

A contingent Remainder must vest during the continuance of the particular Estate.

§ 2. It is not only necessary that a vested legal freehold estate should precede a freehold contingent remainder, but some such preceding freehold estate must subsist and endure, until the time when the contingent remainder vests, that is, until the contingency comes to pass: for it is a general rule, that every remainder must vest, either during the particular estate, or else at the very instant of its determination. So that, if a *Plow. 25.*
lease

lease be made to *A.* for life, and, after the death of *A.*, and one day after, the land to remain to *B.* for life, this remainder to *B.* is void; because it cannot take effect immediately upon the determination of the preceding estate.

§ 3. This rule was originally founded on feudal principles, and was intended to avoid the inconveniences which might arise by admitting an interval, when there should be no tenant of the freehold, to do the services to the lord, or answer to stranger's *præcipe*, as well as to preserve an uninterrupted connection between the particular estate and the remainder; which, in the consideration of law, are but several parts of one whole estate.

1 Inst. 378 a.

§ 4. If, therefore, a lease for life be made, with remainder to the right heirs of *J. S.*, this remainder will never vest, if the tenant for life dies before *J. S.*; for, in that case, the particular estate determines before the contingency comes to pass, on which the remainder is limited to take effect, that is, the death of *J. S.*, for *nemo est hæres viventis*.

Jenk. 248.

pl. 38.

2 Roll. Ab.

418. (l. p. 4)

§ 5. So, where *A.* seised of lands in fee, makes a lease for years to *B.*, remainder in tail to *C.*, remainder to the right heirs of *B.*, in this case, *B.* has nothing in the fee; but it is a contingent remainder to his heir, for *B.* did not take the freehold. If *C.* dies without issue in the life-time of *B.* the remainder becomes void; for the foundation and support of this contingent remainder fails, because it ought to have a freehold

freehold to support it when the remainder falls out : but, by *C*'s. death without issue, living *B.*, the freehold is expired before *B.* can have an heir, and therefore the remainder will never take effect.

§ 6. A testator devised to his wife for life, remainder to *E.* his son for 99 years, if he should so long live, and, after the deceases of the wife and *E.* his son, to the heirs of the body of the said *E.*, but not to descend entirely unto *E*'s. eldest son, but that *E.* might appoint the same to all his children living at his death ; and, in default of appointment, then to his sons as tenants in common in tail, remainder to his daughters, remainder over. The mother died in the life-time of *E.* the son, and it was held, that the limitation to the issue of *E.*, being a contingent remainder, failed by the death of the mother, (who had the only preceding estate of freehold), in *E*'s. life-time, for want of a continuing particular estate of freehold to support it.

Doe v. Morgan,
3 Term R.
763.

§ 7. There are some few instances of vested remainders taking effect, though the preceding estate be defeated ; as, where the lessor disseises *A.* his lessee for life, and makes a lease to *B.* for the life of *A.* remainder to *C.* in fee : here, though *A.* enters and defeats the estate for life, the remainder to *C.* is good ; for, having been once vested by a good title, it would be unreasonable that the lessor should have it against his own livery.

A vested
Remainder
may take ef-
fect though
the preceding
Estate be de-
feated.

1 Inst. 298 a.

§ 8. So, if a lease be made to an infant for life, *with a remainder over*, if the infant, at his full age, disagree

Id.

disagree to the estate for life, yet the remainder is good, having once been vested by a good title.

Posthumous
Children now
take as if
born.

Booth's Op.
Shep. Touch.

§ 9. In consequence of these principles, where an estate was limited to *A.* for life, remainder to his first and other sons in tail, a posthumous son of *A.* could not take. It was, therefore, the ancient practice, in settlements on unborn sons, to insert a remainder to the intended wife, *ensient* at the death of the husband, and her assigns, till the birth of one or more posthumous sons, and, from and after the birth of any such posthumous sons, to every of them successively in tail.

Reeve v.
Long,
Salk. 227.

§ 10. *John Long* devised lands to his nephew *Henry* for life, remainder to his first and other sons in tail male, remainder to his nephew *Richard* for life, &c. *Henry* died without issue, leaving his wife *ensient* with a son. *Richard* entered as in his remainder, and, afterwards, the posthumous son was born, and his guardian entered upon *Richard*. And it was held, that nothing vested in the posthumous son, because a contingent remainder must vest during the particular estate, or at the moment of its determination.

On an appeal to the House of Lords, this judgment was reversed against the opinion of all the Judges, who were much dissatisfied with the reversal.

§ 11. The hardship of this case, and the discontent of the Judges upon the determination of the Lords, produced the statute 10 and 11 *William 3. c. 16.*, which

which enacts, “ That where any estate is or shall, by
 “ any marriage or other settlement, be limited in re-
 “ mainder to, or to the use of the first and other son
 “ or sons of the body of any person, with any remain-
 “ der or remainders over to, or to the use of any other
 “ person or persons, or in remainder to the use of a
 “ daughter or daughters, with any remainder or re-
 “ mainders to any other person or persons, that any
 “ son or sons, daughter or daughters of such person
 “ or persons that shall be born after the decease of his,
 “ her, or their father, shall and may by virtue of such
 “ settlement, take such estate so limited to the first and
 “ other sons, or to the daughter or daughters, in the
 “ same manner as if born in the life-time of his, her,
 “ or their father.”

§ 12. Mr. *Butler*, in his notes on the first *Institute*, 298 b.
 observes, that it is singular this statute does not ex-
 pressly mention limitations or devises made by wills.
 There is a tradition, (says he), that, as the case of
Reeve v. Long arose upon a will, the Lords considered
 the law to be settled by their determination in that case,
 and were unwilling to make any express mention of
 limitations or devises made in wills, lest it should ap-
 pear to call in question the authority or propriety of
 their determination. Besides, the words of the act
 may be construed, without much violence, to comprize
 settlements of estates made by wills, as well as settle-
 ments of estates made by deeds.

Bull. N. P.
 135.

§ 13. A posthumous child, born after the next rent
 day had incurred subsequent to the death of his fa-
 VOL. II. Z ther,

ther, is entitled, under the statute 10 and 11 *Wm.* 3., to the intermediate profits of the lands settled, as well as to the lands themselves.

Basset v.
Basset, 8 Vin.
Ab. 87.
3 Atk. 203.

§ 14. A bill was brought by *Basset* an infant against his uncle, to have an account of the real and personal estate of his father: upon which, several questions arose. The first related to the real estate, and was this.

J. P. Basset, father of the infant, settled the bulk of his estate in marriage to himself for life, remainder to trustees to preserve contingent remainders, remainder to the wife for life, remainder to his first and other sons *for life*, remainder to his brother for life, who was the defendant. *Basset* the father died, his wife *privement ensient*. *Basset* the uncle entered. Eight months after, the son was born, and entered upon his uncle. And the question was, who should have the intermediate profits from the death of the father to the birth the son.

Lord *Hardwicke*.—As to this point, it must depend upon the construction of the statute 10 and 11 *Wm.* 3. c. 16.; and, as to that, it must be considered what was the mischief intended to be remedied, and what remedy the legislature have applied. Now, the defendants say, nothing was intended to be remedied but the vesting of the remainder, which, they say, was the only evil complained of in the case of *Reeves v. Long* in the House of Lords, which was the foundation and occasion of that act; but I am of opinion, this was not the

the single mischief that was intended to be prevented, but the whole evil. And they meant not only to give posthumous children power to enter, but to take the profits also, according to the intention of persons making settlements, and wills too, of this kind; and this appears both from the title, preamble, and provision of the statute, and the words are so plain, that, to put any other construction upon them, would be to repeal the act, which says, “such posthumous child shall take “in such manner as if born in the life of his father.” But it was said by the defendants counsel, that the words take, &c. meant only that he should take the remainder in such manner as heirs at law by descent take, who have not intermediate profits, and that this being a new law, ought to be considered according to the rules of common law, in similar cases; and it is true, it is a usual manner of construing new acts according to the old rules, but to do so in this case, would be repugnant to the words of the act; for heirs by descent do not take as if born in the life of their father; but the addition of these words in the act, “although no trustees to preserve contingent remainders,” clears this of all objections, and as, before that act, all accurate conveyancers inserted such limitations, so, since, they have left them out, which plainly shews their sense of the statute. But the objections on the part of the defendant are these, that there must be some tenant to the freehold, some body to answer the *præcipes* of strangers, and this can be nobody but the uncle. As to this, I do not know whether it is material for me to consider it, because I can get at it in an-

other way ; but judges, in such cases, must mould and frame such estates as are agreeable to the plain intention of the legislature. It may vest in the uncle, and divest upon the birth of a son by relation, and this is agreeable to the construction of law in other instances, as in the case of enrolment of deeds ; here, though a person has no title till enrolment, yet, from the enrolment, he is in from the time of the execution of the deed. As to the objection, that there is no legal remedy for the profits against the uncle, I think, if my construction of the act is right, the son might bring an ejectment, and lay his demise to the time of the death of his father, and every body would be estopped to say that he was not born in the life of his father ; for how could the defendant take the objection ? not till he had entered into the common rule ; and, though it is at the plaintiff's peril, if he lays his demise before his title accrued, yet, if my construction is right, his title did accrue, and it would be immaterial whether he could or could not in fact make such demise, because such demises are only looked upon as matters of form, and not real, for infants make such demises every day. But, suppose this point of law was otherwise, I am of opinion, this court would make the uncle a trustee for the infant, and that seems to me to be the meaning of the act of parliament ; and, though it is natural to pursue legal remedies, where such are to be had, yet that is no reason, if they are not to be had, why remedies should not be enforced here. I am, therefore, of opinion, the intermediate profits of the settled estate must go to the infant.

§ 15. But

§ 15. But although no interval is admitted between the determination of the particular estate, and the vesting of the remainder, yet a remainder may be so limited, as not to vest until the very instant on which the particular estate determines.

A Remainder may vest at the instant the particular Estate determines.

§ 16. Thus, if an estate be limited to *B.* during the life of *A.*, remainder to the heirs of the body of *A.*, this is good; though such remainder cannot vest till the very instant the particular estate determines.

§ 17. So, if land be given to *A.* and *B.* during their joint lives, remainder to the right heirs of him who shall die first, this remainder will be good, though it cannot vest before the determination of the particular estate.

1 Inst. § 73 b.

§ 18. From the principle, that a contingent remainder must vest at or before the determination of the particular estate, it follows, that an estate limited on a contingency, may fail as to one part, and take effect as to another, wherever the preceding estate is in several persons, in common or in severalty; for the particular tenant of one part may die before the contingency, and the particular tenant of another part may survive it.

A Remainder may fail as to one and take effect as to another.

Fearne, 458.

§ 19. A feme covert and a stranger being joint tenants for life of copyhold lands, with remainder to the heirs of the body of baron and feme; the stranger surrendered his moiety to the baron and feme, and

Lane v. Pannel,
1 Roll. Rep.
238. 317.
438.

afterwards the baron surrendered the whole to *B.* in fee. The feme died, leaving issue, and afterwards the baron died.

The question was, whether the remainder to the heirs of the body of the baron and feme vested in the issue? And it was adjudged, that when the stranger conveyed his moiety to the baron, the jointure between the stranger and feme covert was severed; and when the baron conveyed the whole to *B.*, *B.* took an estate in one moiety for the life of the feme, (defeasible by her on the death of her husband), and in the other moiety for the life of the stranger; therefore, upon the death of the feme, the estate in the first moiety was determined; at which time the remainder, as to that moiety, ought to have vested, which it could not do, because the person to take it was to be the heir of the bodies of both baron and feme; but that it was impossible during the life of the baron, for *nemo est bares viventis*; and, therefore, as the remainder could not vest at the determination of the preceding estate, it should never vest at all, as to that moiety. In this case it appears that the remainder failed as to one moiety.

Gilb. Ten.
252.

§ 20. *Gilbert*, in his *Treatise of Tenures*, seems not to approve of the resolution in the above case; for, by construing the limitation to the heirs of the body of the husband and wife, a contingent remainder; he says, we suppose a deed made and an estate given, where, at the very first, it appeared that for one moiety the deed and estate could have no manner of effect, unless the husband

husband and wife died at one instant of time. But this seems to be a mistake; for the original limitation did not involve any such inconsistency; the inconvenience arose from the subsequent acts. The joint estate for life might have continued unsevered between the wife and the stranger; and on the death of the survivor, there might have been an heir of the bodies of the husband and wife capable of taking when the preceding estate determined, if both husband and wife had died in the life-time of the stranger, or if both husband and stranger had died in the life-time of the wife. *Gilbert* also refers to a case in *Leonard*, of a surrender to the use of the wife for life, remainder to the use of the right heirs of the husband and wife, where the justices were of opinion, that the remainder was executed for a moiety in the wife; but that was not only superseded by the contrary decision in *Lane* and *Pannel*, but was contrary to the preceding case in *Dyer*, 99. 2 *Roll. Ab.* 416. *Dalis*, 20. pl. 8. cited 2 *Leon.* 102. as well as to the doctrine of the latter cases.

§ 21. A contingent remainder may take effect in some, and not in all the persons to whom it was limited, according as some may come *in esse* before the determination of the particular estate, and others not.

A Remainder may take effect in some though not in all.
Ferne, 460.

§ 22. Thus, if a limitation be to *A.* for life, remainder to the right heirs of *J.* and *K.*: here, if *J.* happen to die before *A.*, and *K.* to survive *A.*, the heirs of the first may take, but those of the latter, it seems, will be for ever excluded; for the heirs of *J.* are *in esse* at the determination

Comb. 467.
1 Inst. 9 a.

determination of the preceding estate, but not the heirs of *K.* who is then living.

§ 23. This doctrine, however, seems confined to limitations at common law, and not to extend to estates created by way of devise.

Ch. i. f. 48. § 24. Thus, in the case of *Doe v. Perryn*, which has been already stated, the daughter had no child at the testator's death, but afterwards had three by her said husband, who died in their parent's life-time. One point contended for was, that the limitation being to the children in fee, was contingent till the death of the mother; and, therefore, the remainder over took effect on her leaving no child. But it was held, that the fee vested in the child first born, and afterwards opened and let in those born at subsequent periods.

Ferne, 464. If there be no particular estate *in esse*, nor any present right of entry, when the contingency happens, although the particular estate be afterwards replaced and restored, yet will the remainder never arise. Only it seems that the reversal of a fine by act of parliament will restore a contingent remainder destroyed by that fine; though a reversal for error will not.

Infra, ch. 5.

TITLE XVI.

REMAINDER.

CHAP. V.

Of Remainders limited by way of Use and Contingent Uses.

- | | |
|--|--|
| § 1. <i>Remainders limited by Way of Use.</i>
6. <i>There must be a particular Estate to support the Remainder.</i> | 11. <i>Remainders by Way of Use will devest in favor of Persons becoming entitled.</i>
15. <i>Contingent Uses.</i>
17. <i>Springing Uses.</i>
24. <i>Shifting Uses.</i> |
|--|--|

Section 1.

REMAINERS, whether vested or contingent, may be limited by way of use, as well as by conveyances which derive their effect from the common law; and remainders are now usually created by conveyances to uses.

Remainders limited by Way of Use.

§ 2. Thus, if a person covenants to stand seised to the use of *A.* for life, remainder to his first and other sons in tail, (*A.* having no sons at the time), remainder to *B.* in tail, remainder to the covenantor in fee, a use immediately arises out of the seisin of the covenantor to *A.* for life, and to *B.* in tail; which are immediately executed by the statute 27 *Hen.* 8. c. 10, because in this case there are persons seised to a use, a *cestuique* use, and a use *in esse*: but with respect to the contingent uses

Wegg v. Villers,
 2 *Roll. Ab.*
 769.
 2 *Sid.* 64.
Heyn v. Villers, *Infra.*
Vide Tit. 11.
 ch. 3. § 7.

uses limited to the first and other sons of *A.*, they cannot possibly be executed, because there are no *cestuique use in esse*. The moment *A.* has a son, a use in tail arises to him out of the seisin of the covenantor, who has the reversion in fee of the legal estate in him; and the statute executes the legal estate to such first son, who becomes tenant in tail in remainder of the legal estate, expectant on the determination of *A.*'s life estate.

§ 3. When the conveyance operates by transmutation of possession, as in the case of a fine, recovery, or release to uses, other principles have been adopted to support contingent remainders limited in this manner.

Thus, if lands are conveyed to trustees and their heirs by fine, recovery, or release, and it is declared that these assurances shall enure to the use of *A.* for life, remainder to his first and other sons in tail, (*A.* having no sons at the time), remainder to *B.* in fee; in this case the use for life limited to *A.*, and the use in remainder limited to *B.*, are immediately executed by the statute, and converted into legal estates; because there are persons seised to a use, a *cestuique use*, and a *use in esse*. But with respect to the contingent uses limited to the first and other sons of *A.*, they cannot possibly be executed, because there is no *cestuique use in esse*. Whenever *A.* has a son, then there is a *cestuique use in esse*; a use therefore vests in such son in tail, and the statute transfers the legal estate to that use.

§ 4. But

§ 4. But as no use can be executed by the statute, unless there is some person seised to such use, it was much doubted in *Chudleigh's* case, which was the first that arose on this point, out of what seisin the use arose to the first son of *A.* at the time of his birth. Some of the Judges held, that the first seisin of the feoffees, was sufficient to feed all the future and contingent uses, which were in abeyance until the contingency happened on which they were to arise; and, therefore, that they might be destroyed by the alienation of the tenant for life. The majority of the Judges were, however, of opinion, that, until uses are executed, they remain as they were before the statute; and that, upon a conveyance to uses, there is no actual seisin left in the feoffees, but that, as to all uses *in esse*, and which vest immediately, the seisin is presently transferred to the *cestuique* use; and, as to the contingent uses, there is no present seisin existing anywhere. But as the statute of uses transfers the possession in the same manner, and to the same extent, as the uses are limited, there remains a possibility of a seisin in the feoffees or releasees, or, as *Dyer* has expressed it, 2 Rep. 129 b. 137 a. 1 Inst. 271 b. Vide Garth v. Cotton, ch. 7. 340 b.

“ *adhuc remanet quedam scintilla juris, et tituli quasi*
 “ *medium quid, inter utroque status, scilicet illa possibi-*
 “ *litas futuri usus emergentis; et sic interesse et titulus,*
 “ *et non tantum nuda auctoritas, seu potestas remanet.*”

This possibility of entry or *scintilla juris*, was deemed sufficient to support the contingent uses when they came in *in esse*, and takes effect when these contingencies happen, on which the uses are limited to arise, so as then

then to give the feoffees a sufficient seisin to serve those uses, that they may be executed by the statute.

§ 5. The absolute necessity of supposing some person to be seised to a use before it can be executed by the statute, was the reason of adopting the doctrine of a possibility of entry or *scintilla juris* in the releasees. The framers of the statute of uses do not appear to have had contingent uses in contemplation, when they penned the act, otherwise they would probably have inserted some clause respecting them; and when a case of contingent uses arose, they found themselves under the absolute necessity of recurring to this fiction, in order to support contingent uses: for, if the Judges had not adopted this doctrine, they must have allowed the seisin of the last *cestuique* use to have been sufficient to support a contingent use, when it came *in esse*, which would be raising an use upon an use; or else they must have determined, that the land should remain for ever liable to the uses to which it was conveyed, into whose hands soever it might come, which would be a bar to the free alienation of property, and might tend to create a perpetuity.

There must be a particular Estate to support the Remainder.

1 Rep. 135 a.

§ 6. The rule respecting an estate necessary to support a contingent remainder holds equally in the limitation of contingent remainders by way of use, as by common law conveyances; for although, before the statute of uses, a feoffment to the use of A. for years, remainder in contingency, would have been good, because the feoffees remained tenants of the legal freehold;

hold; but, since that statute, it is otherwise, for no estate remains in the feoffees or releasees to uses.

§ 7. A person conveyed by lease and release to trustees and their heirs, to the use of himself for 99 years, remainder to the use of trustees for 25 years, remainder to the heirs male of his own body, remainder to his own right heirs; the court held, that the limitation to the heirs male of the body of the releasor was void, because there was no preceding estate of freehold limited to support it.

Adams v. Savage,
Salk. 679.

§ 8. Husband and wife covenanted to levy a fine of the wife's land, to the use of the heirs of the body of the husband on the wife begotten, remainder to the use of the right heirs of the husband. They had issue that died in their life-time, and afterwards the wife died, living the husband. It was resolved, that the limitation to the heirs of the husband was void for want of a preceding estate of freehold to support it. For the husband could not take an estate for life by implication, because the estate belonged to the wife: and, supposing an estate for life in the wife by implication, or resulting use, capable of supporting the use to the heirs of the body of the husband on the wife, yet she, as well as their issue, having died in the husband's life-time, before the limitation to his right heirs could vest, that must have failed as a contingent remainder, for want of a subsisting particular estate to support it at the time of his death.

Davies v. Speed, Show. Parl. Ca. 104.
Vide Salk. 675. note.

Tit. 11. ch. 4. § 43.

§ 9. It appears from the reasoning in the preceding case, that where the grantor takes a freehold estate by
a result-

a resulting or implied use arising from the same deed, it will support a contingent limitation, as effectually as if an estate of freehold had been expressly limited to him.

Tit. 11. ch. 4.
f. 22.
2 Freem. 258.

§ 10. So, in the case of *Penbay v. Hurrell*, after solemn agreement on the point, and a case stated to the Judges, it was decreed, that the estate for life which resulted to the cognizor, was sufficient to support the contingent limitation to his first and other sons.

Remainders
by Way of
Use will de-
vest in favor
of Persons
becoming
entitled.

§ 11. It has been stated, that a remainder limited by a common law conveyance may take effect in some, though not in all. But where a contingent remainder is limited by way of use to several persons who do not all become capable at the same time, notwithstanding it vests in the person first becoming capable, yet it will divest, as to the proportions of the persons afterwards becoming capable, before the determination of the particular estate; and they will take jointly, notwithstanding the different times of vesting.

Mathews v.
Temple,
Comb. 467.
1 Ld. Ray.
311.

§ 12. A conveyance was to the use of *A.* the husband for life, remainder to the use of *B.* the wife for life, remainder to all the issues female of their two bodies, and the heirs of the bodies of such issues female: *A.* and *B.* had issue a daughter; and it was resolved the remainder in tail to the issues female, was not so attached in that daughter as not to be divested for a moiety on the birth of another daughter: for such a limitation being by way of *use*, springs out of the

the estate, according to the capacity of the person in whom it is to vest. And *Holt* held, that the daughters were joint tenants of the freehold, and tenants in common of the inheritance.

§ 13. Lands were settled to the use of a wife for life, remainder to the use of the husband for life, remainder to the use of all and every their child or children equally, if more than one, as tenants in common, &c. subject to a power of appointment in the parents. It was held, that the remainder vested in the children on their respective births.

Doe v. Martin,
4 Term R.
39.

§ 14. So, where one devised to his daughter and her children on her body begotten, or to be begotten by her then husband, and their heirs for ever: the daughter, at the time of the will, had one child, and others afterwards. It was held, the mother and all the children took jointly in fee, it being stated, that, at the time of the will, she had a child which had been construed equal to children, 2 *Vern.* 106.; that *Co. Lit.* 9. was express, that to *A.* and *liberis suis*, and their heirs, was a joint fee to all; and that it was no objection, that the several estates might commence at *different times.*

Oates v. Jackson,
2 Stra. 1172.

Fearne, 462.

§ 15. Soon after the statute of uses, and even so late as 31 *Eliz.*, it was laid down by *Popham* Chief Justice, in *Chudleigh's* case, that no limitation of a use, which was contrary to the rules established at common law, respecting the limitation of legal estates, should be

Contingent
Uses.

1 Rep. 130a.
134b. 138a.

be executed by the statute; for, otherwise, all the mischiefs intended to be remedied by the act would be continued, or greater introduced. But this idea was soon departed from, and advantage taken of an expression in the statute of uses, in order to support several of those limitations which had been allowed by the Court of Chancery in declarations of uses, when they were distinct from the legal estate.

§ 16. The statute of uses enacts, that the estate of the feoffees to uses shall be in *cestuique use* “after such
“ quality, manner, form, and condition, as they had
“ before in or to the use, confidence, or trust that was
“ in them.” Now the Court of Chancery having permitted the limitation of a use for life, or in tail, to arise *in futuro*, without any preceding estate limited to support it; and also a use to change from one person to another, by matter *en post facto*, though the first use were limited in fee; the courts of law, in process of time, admitted of limitations of this kind in conveyances to uses, and determined that in such cases the statute would transfer the possession to the *cestuique use*, in the same quality, form, and condition as he had the use.

Springing
Uses.

§ 17. With respect to uses limited to arise *in futuro*, without any preceding estate to support them, which are usually called *springing uses*, the first case in which a limitation of this kind was allowed, appears to have been determined in 10 *Eliz.* and is thus reported by *Dyer*.

§ 18. *J. M.*

§ 18. *J. M.*, being seised of certain lands in fee, levied a fine thereof, and by indenture declared the use of it to be to himself, and to such wife and wives as the said *J. M.* should happen afterwards to marry, by whatever names she or they might be called, for and during their natural lives, and the life of the survivor of them, with divers remainders over; and, afterwards, the said *J. M.* took to wife one *A.*, and then died. Whether she should take any thing by the said indentures or fine, or not, was the question; and by the opinion of *Wray* and *Meade*, Serjeants, and *Plowden* and *Onslowe*, Solicitors, she might, and thereto they subscribed their names. *Moore* states, that the parties 517. not being satisfied with this determination, the case was carried into the Court of Common Pleas, where it was adjudged in the same manner.

Mutton's
case,
Dyer, 274 b.

§ 19. The next case that arose on this point, was in 37 and 38 *Eliz.*, and is thus reported by *Croke*. A person made a feoffment, and it was declared by indenture that it should be to the use of himself, and *A.* his wife, that should be after their marriage, and of the heirs of their bodies, and he took *A.* to wife. Whether she should take by the limitation of this use was the question. *Coke* Attorney General, contended that she should not, for presently, by the feoffment, the fee was in the husband, by the possession executed to the use which he had before by the marriage, which could not, after the marriage, be divided, and made an estate tail in him, as he had the fee in him until the marriage; for it might have been that the marriage had never taken effect, and that would have confounded

Woodliff v.
Drury, Cro.
Eliz. 439.

1 Rep. 136 a.
Vide Brent's
case, and
Bould v.
Winston,
Infra.

the other use: and uses *in futuro* could not arise upon such future acts, for then an use would rise out of an use. But all the Justices held, that although he be seised in fee in the meantime, as in truth he was, yet, by the marriage, the new use should arise and vest.

Salk. 675.
12 Mod. 39.

§ 20. It is said by Lord Chief Justice *Holt*, that a feoffment to the use of *A.* and his heirs, to commence four years from thence, was good as a springing use.

§ 21. In a modern case, this doctrine was admitted, and an estate of freehold was allowed to arise *in futuro*, upon a covenant to stand seised to uses.

Roe v.
Tranmer,
2 Will. Rep.
75.

§ 22. *Thomas Kirby* being seised in fee of the lands in question, executed indentures of lease and release of them to his brother. The lease was made for a year in the usual manner; the release witnessed, that for the natural love which *Thomas Kirby* bore to his brother, and, in consideration of 100*l.* paid to him by his brother, the said *Thomas Kirby* granted, released, and confirmed to his brother, (in his actual possession then being by virtue of the lease for a year), after the death of the said *Thomas Kirby*, all that close, &c. to hold the same to his said brother, and the heirs of his body.

It was admitted, that this conveyance was void as a release, because it was a grant of a freehold to commence *in futuro*: but the court held, that it should operate as a covenant to stand seised to uses, and that the estate should vest in the brother as a springing use.

§ 23. In

§ 23. In all cases of springing uses, the estate remains in the original owner until the use arises; and where there is no transmutation of possession, the springing use arises out of the seisin of the covenantor or bargainor. But where there is a transmutation of possession, the new use arises out of the seisin of the feoffees, releasees, &c.

§ 24. With respect to uses limited so as to change by matter *ex post facto*, which are usually called *shifting* or *secondary uses*, the following is the first case in which the validity of a limitation of this kind was discussed. Shifting Uses.

§ 25. A person made a feoffment in fee to the use of *W.* and his heirs, until *A.* paid 40 *l.* to *W.*, and then to the use of *A.* and his heirs. *A.* paid the 40 *l.* Some of the Judges said, that if *A.* entered, he would become *ipso facto* seised in fee; for *W.* being seised in fee by the statute of uses, *A.* would be able to divest that fee, and transfer it to himself upon performance of the condition. Others were of opinion, that the payment of the money, and the entry of *A.*, had no effect, without an entry by the feoffees: and then *quacunque via data*, the entry would be good, and *A.* would become seised according to the terms of the deed. To this, it was added, that a use might change from one person to another by some act or circumstance *ex post facto*, as well since as before the statute.

Bro. Ab. Tit.
Feoff. al. Use,
pl. 30.

§ 26. *A.* seised of the manor of *K.*, made a feoffment of it to the use of trustees and their heirs, upon

Harwell v.
Lucas, Moo.
Rep. 99.
1 Leon. 264.

condition, that if they did not pay 10,000 *l.* in 15 days, then it should be to the use of the feoffor and *M.* his wife, remainder to *Thomas* their second son in tail, with divers remainders over. The money was not paid, and it was resolved that the uses arose, and that, after the death of the feoffor and his wife, *Thomas* the second son was well entitled to the land.

§ 27. It is observable, that these cases were prior to that of *Chudleigh*, so that the doctrine of a possibility of entry, or *scintilla juris*, was not then established. But since *Chudleigh's* case, it is settled, that all contingent uses must arise out of the seisin of the covenantors, feoffees, or releasees to uses, and not out of the seisin of any prior *cestuique* use. Thus, it is laid down by four of the Judges in *Chudleigh's* case, that if *A.* enfeoff *B.* in fee, to the use of *C.* and his heirs, with a proviso, that if *D.* pay *C.* 100 *l.*, that *C.* and his heirs shall stand seised to the use of *D.* and his heirs, this is utterly void; for the future use ought to be raised out of the estate of the feoffee, and not out of the estate of the *cestuique* use.

Kent v.
Steward,
2 Roll. Ab.
792. Cro. Car.
358.

§ 28. *A.* levied a fine of the manors of *D.* and *S.*, and declared the uses by deed, as to the manor of *D.*, to the use of *B.* and his heirs, and as to the manor of *S.*, to the use of *A.* and his heirs, until *B.* should be evicted out of the manor of *D.* by the wife of *A.*, and after such eviction, to the use of *B.* and his heirs, until he should be satisfied with the profits of the land for the damages received by the eviction. This was held

to be a good contingent use of the manor of S.; so that nothing vested in *B.* till an eviction.

§ 29. *A.*, who was tenant for life, and *R.*, who was entitled to the reversion in fee, covenanted to levy a fine to the use of *A.* and his heirs, if *R.* did not pay him 10 s. on the 10th of *September* following; and if he did pay it, then to the use of *A.* for life, remainder to the use of *R.* in fee. It was held, that *A.* had an estate in fee until *R.* paid the 10 s.

Spring v.
Cæsar,
1 Roll. Ab.
415.

§ 30. *Mary* and *Penelope Tannott*, being seised in fee as co-heirs, in consideration of 4000 l. paid to *Mary* by *Richard Carew*, and of a marriage which soon afterwards took place between *Penelope* and *Richard Carew*, the said *Mary* and *Penelope* conveyed all their estates to trustees and their heirs, to the use of *Richard Carew* for life, remainder to *Penelope* for life, for her jointure, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of *Richard* and *Penelope* in tail male successively, remainder to the daughters in tail, with the ultimate remainder to the said *Richard Carew* and his heirs for ever; subject to a proviso, that if it should happen that no issue of the said *Richard* by the said *Penelope*, should be living at the decease of the survivor of them, and the heirs of the said *Penelope* should, within twelve months after the decease of the survivor of the said *Richard* and *Penelope*, dying without issue as aforesaid, pay to the heirs or assigns of the said *Richard Carew* 4000 l., that then the remainder in fee-simple so limited to the said *Richard Carew* and his heirs should

Lloyd v.
Carew.
Show. Parl.
Ca. 137.

cease, and that then and from thenceforth the premises should remain to the use of the right heirs of the said *Penelope* for ever. It was resolved, that this was a shifting use.

§ 31. Mr. *Booth*, in his opinion, printed at the end of Mr. *Hilliard's* edition of *Shepherd's Touchstone*, has observed, that every modern marriage settlement contains a variety of shifting uses. Thus, where the intended husband, in consideration of the marriage and portion, conveys his estate to trustees and their heirs, to the use of himself and his heirs until the marriage is solemnized, and, from the solemnization thereof, to the use of himself for life, remainder to his wife for life, remainder to trustees to preserve contingent remainders, remainder to his first son and the heirs male of the body of such first son, remainder to all the other sons severally and successively in the same manner, remainder to all the daughters of the marriage in tail as tenants in common, &c. In this case, the intended husband is seised in fee until the marriage; on that event, his estate in fee ceases, and a new use arises to him for life only, with several contingent uses to his children. On the birth of a son, a use in tail arises in remainder to such son, and, on the birth of every other son, a similar use in tail arises to him; on the birth of a daughter, a use in tail arises in remainder to her; on the birth of another daughter, the last remainder in tail ceases, and both daughters become entitled, by way of use, to a tenancy in common in remainder in tail.

§ 32. In settlements made on the younger sons of noble families, there are provisos frequently inserted, that if the family estate and title descend on such younger sons, the estate limited to them shall cease, as if they were dead without issue, and shall go over to the person next in remainder, which is a shifting use.

Vide 1 Inst.
327 a. n. 2.

§ 33. It is the same where a proviso is inserted, that if the person to whom an estate is limited, shall not take the name and arms of the settlor, the estate shall cease and determine, as to the person so refusing to take such name and arms, and shall go to the person next beneficially entitled in remainder, under the limitations contained in such settlement. Id.

§ 34. It has been resolved, that contingent uses were only allowed, in order to give persons a power to provide for all the exigencies of their families, and that, wherever there was a preceding estate capable of supporting a subsequent contingent limitation, it should be construed to be a contingent remainder, and not a springing or shifting use.

Fearne Ex.
Dev. 5.
Doug. Rep.
757.

TITLE XVI.

REMAINDER.

CHAP. VI.

How Contingent Remainders and Contingent Uses may be destroyed.

- | | |
|---|---|
| <p>§ 1. <i>Determination of the particular Estate before the Contingency.</i></p> <p>8. <i>A Conveyance by Way of Use will not destroy a Remainder.</i></p> <p>9. <i>Nor a Conveyance by a Cestuique Use.</i></p> <p>10. <i>A Forfeiture does not always destroy a Remainder.</i></p> <p>13. <i>But an Extinguishment of the particular Estate will destroy it.</i></p> | <p>15. <i>An Alteration in the Quantity of the particular Estate will destroy it.</i></p> <p>28. <i>How Remainders limited by Way of Use may be destroyed.</i></p> <p>29. <i>Where created without Transmutation of Possession.</i></p> <p>32. <i>Where created by Transmutation of Possession.</i></p> <p>39. <i>How springing and shifting Uses may be destroyed.</i></p> |
|---|---|

Section. 1.

Determina-
tion of the
particular
Estate before
the Contin-
gency.

IT has been already shewn, that a legal remainder must vest, either during the existence of the particular estate *in esse* or in right of entry, or at the very instant of its determination; otherwise it will never take effect at all: consequently, every such determination of the preceding estate, before the contingency happens, as leaves no right of entry, must effectually destroy such contingent remainder,

1 Rep. 136.
135 b.

§ 2. Thus, where a tenant in tail, with a contingent remainder expectant thereon, makes a feoffment of the estate tail, the contingent remainder is destroyed.

§ 3. It

§ 3. It the same where a tenant for life, with a contingent remainder expectant on his estate, makes a feoffment of his estate for life, it destroys the contingent remainder,

§ 4. Lands were devised to *Robert Archer* for life, and afterwards to his next heir male, and to the heirs male of the body of such next heir male. *Robert Archer* made a feoffment of his estate; and it was adjudged, that the devise to the heir male was a contingent remainder, and was destroyed by the feoffment; for every contingent remainder ought to vest, either during the particular estate, or at least *eo instanti* that it determines; for if the particular estate be ended or determined, in fact or in law, before the contingency falls, the remainder is void. Archer's case,
1 Rep. 66.

§ 5. A fine levied or a recovery suffered by a particular tenant will, in most cases, destroy a contingent remainder expectant on such particular estate; because such fine or recovery bars and destroys the particular estate. Vide Tit. 35,
36.

§ 6. A surrender by a tenant for life of his life estate, will destroy a contingent remainder limited upon such estate for life.

§ 7. A person was tenant for life, with remainder to his first and other sons in tail, remainder over in tail. The tenant for life, before he had a son, surrendered his life estate to the person in remainder: the tenant for life afterwards had a son: and the court held, Thompson
v. Leach,
2 Salk. 427.

held, that the surrender, if good, would have destroyed the contingent remainder to the unborn son. But the surrender was adjudged void, because it appeared that the tenant for life was *non compos* at the time he made the surrender.

Fearne, 468.

A Convey-
ance by Way
of Use will
not destroy a
Remainder.

Vide Tit. 32.

§ 8. If there be tenant for life with contingent remainders thereon, a bargain and sale or lease and release by the tenant for life will not destroy the contingent remainders; because these conveyances only transfer what the person seised of the land may lawfully convey, and do not divest any estate.

Nor a Con-
veyance by a
Cestui que
Trust.

Fearne, 472.

§ 9. A person who has only a trust estate cannot, by any mode of conveyance, destroy a contingent remainder expectant on his estate; for the legal estate being in his trustees, there remains a right of entry in them, which will support the remainders.

A Forfeiture
does not al-
ways destroy
a Remainder.

Fearne, 473.

§ 10. There are some acts of a tenant for life which, though they amount to a forfeiture of his estate, so as to give a vested remainder-man title to enter if he pleases; yet, as they discontinue, divest, or disturb no remainder or subsequent estate, nor make any alteration in or merger of the particular estate, do not therefore, as it seems, destroy or affect a contingent remainder, unless advantage is taken of the forfeiture by any subsequent remainder-man.

1 Inst. 252 a.
Vide Tit. 35.

§ 11. Thus, if a tenant for life accepts a fine from a stranger, it is a forfeiture of his estate, so as to entitle

a re-

a remainder-man to enter ; and yet it does not displace or develt the remainder or reversion.

§ 12. *A.* was tenant for life, remainder to his first son in tail, &c., remainder to *B.* for life, remainder to his first son in tail, &c. *A.* having a son, accepted a fine from *B.*, and then made a feoffment in fee. Afterwards *B.* had issue a son ; and it was resolved, that the acceptance of the fine displaced nothing ; and though *A.*'s feoffment displaced all the estates, yet the right of entry in the son of *A.* supported the contingent remainders.

Lloyd v. Brooking,
1 Vent. 188.

§ 13. But a contingent remainder may be destroyed by an act which, though it does not discontinue or develt any remainder or subsequent vested estate, yet extinguishes the particular estate on which the contingent remainder depends.

But an Ex-
tinguishment
of the par-
ticular Estate
will destroy
it.

§ 14. This has been already seen in the instance of a surrender to the person entitled to the next estate in remainder. And so where a feme covert was tenant for life, with remainder to her first son, and before the birth of a son the remainder in fee was conveyed to the husband and wife by fine. The court held, that the contingent remainder was destroyed by the extinguishment of the particular estate.

Ante, f. 7.

Purefoy v. Rogers,
2 Saund. 380.
4 Mod. 284.

§ 15. It has been frequently laid down, that any alteration in the nature of the preceding estate, before the remainder vests, will destroy such remainder.

An Altera-
tion in the
Quantity of
the particular
Estate will
destroy it.

As

4 Leon. 237.

As if lands be given to *A.* in tail, and if *J. S.* comes to *Westminster Hall* such a day, remainder to *J. S.* in fee. It has been said, that if the lands descend to two co-parceners who make partition, the fee shall not accrue to *J. S.* though he should come to *Westminster Hall* at the day. And it has also been said, that if lands be given to *A.* and *B.* for the life of *C.*, remainder to the right heirs of *A.* and *B.*, and *A.* releases to *B.*, the remainder is destroyed.

Id.

496.

§ 16. But notwithstanding these *dicta*, Mr. *Fearne* was of opinion that the alteration in the particular estate which would destroy a contingent remainder, must amount to an alteration in its quantity, and not in its quality. This conclusion he thought was warranted by two adjudged cases.

1 Roll. Rep.
238. 317.
438.

§ 17. The first is that of *Lane* and *Pannel*, before stated, where it seems that the severance of the jointure between two joint tenants for life, did not destroy the contingent remainder limited after their joint estate; for there it is adjudged, that because the remainder could not vest at the death of one of them, (after the severance of the jointure), such remainder was gone as to *one moiety* of the lands. Now this judgment was nugatory and groundless, if the severance itself destroyed the remainder as to the whole. This, it is true, was the case of a surrender of copyhold lands; but, however, no distinction at all was taken on that ground.

Harrison v.
Belfey,
Raym. 413.

§ 18. The other case was where lands were settled to the use of *P.* and *S.* his daughter for their lives,
remainder

remainder to the use of the first and other sons of S. in tail male, remainder to her daughters, remainder to the heirs of P. S. afterwards, and before the birth of a son, by deed, released all her right and estate to the use of P. and his heirs. The question was, whether the contingent remainder limited to the first son of S., was destroyed by her release to her father? And it was adjudged, that the release by S. to P., (*i. e.* by one joint tenant for life to another), did not destroy the contingent remainder to her first son.

Vide Fearn
Cont. Rem.
497.

§ 19. Lord *Hale* is reported to have laid it down, that in all cases, where the particular estate is merged in the reversion, the contingent remainders are destroyed, though there be no divesting of any estate; and the case of *Purefoy v. Rogers* is cited in support of this opinion. It is, however, observable, that in the above case, the union of the particular estate, and the inheritance, arose from the conveyance or act of the parties. But where a particular estate is limited, with a contingent remainder over, and afterwards the inheritance is subjoined to the particular estate by the *same* conveyance, the contingent remainder is not destroyed. For where, by the same conveyance, a particular estate is first limited to a person, with a contingent remainder over to another, with such reversion or remainder to the first person, as would, in its own nature, crown the particular estate first given him, this last limitation shall be considered as executed only *sub modo*; that is, upon such condition, as to open and separate itself from the first estate, when the condition happens, and by no means destroy or preclude the contingent estate.

2 Saund. 386.

§ 20. Thus,

Ante, ch. 1.
f. 41.

Vide *Meredith v. Leslie*,
Tit. 36.

§ 20. Thus, in *Lewis Bowles'* case, it was resolved that, until issue, *Thomas Bowles* and *Ann* were seised of an estate tail executed *sub modo*, that is, until the birth of issue male; and then by operation of law, the estates were divided, and *Thomas* and *Ann* became tenants for their lives, remainder to the issue in tail male, remainder to the heirs of *Thomas*, as the estate limited to them for their lives was not merged.

§ 21. Where the inheritance becomes united to the particular estate, by an immediate descent from the person by whose will the particular estate and contingent remainders were limited, there the contingent remainder will not be destroyed.

Ante, f. 4.

§ 22. Thus, in *Archer's* case, which has been already stated, notwithstanding the reversion in fee must have descended on *Robert* the devisee, for life, upon the death of his father the testator, yet he was adjudged to be only tenant for life, with contingent remainder to his next heir male.

Plunkett v. Holmes,
Ray. 28.

§ 23. A person devised lands to *T.* his eldest son for life, and if *T.* should die without issue *living at his death*, then to *L.*, another of the testator's sons in fee: but if *T.* should have issue living at his death, then to the right heirs of *T.* for ever. The testator died, and it was resolved that *T.* was tenant for life, with the remainder in fee in contingency; and that the descent of the fee upon him as heir, at the death of his father, did not destroy the contingent remainder.

§ 24. In

§ 24. In a modern case, Lord *Eldon* observed, that, in the case of *Plunket v. Holmes*, the court would not hold that the estate for life limited to the heir at law, was merged by the subsequent limitation to him of a contingent remainder in fee, for that remainder was not executed. They held, therefore, that the eldest son took an estate for life; which estate for life being sufficient to support the remainder in fee to the second son, and also the remainder in fee to the eldest son, as contingent remainders, they determined that these limitations should be supported as contingent remainders.

Doe v. Scudamore,
Ante, ch. i.
2 Bos. and
Pul. Rep.
295.

§ 25. Mr. *Fearne* observes, that if, in the preceding cases, it had been determined that the contingent remainders were destroyed by the immediate descent of the inheritance upon the devisee of the particular estate, then the will creating such remainders would be *ipso facto* void; for the particular estate given by such will would be destroyed by the descent which such will permitted. But where the descent of the inheritance on the particular estate is only mediate from the person whose will created the particular estate and the remainder, there can be no such inconsistency in supposing the contingency to be destroyed by the descent; for, in all such cases, the particular estate is created and takes effect with a capacity of being afterwards destroyed by those accidents to which the nature of such an estate is generally subject: such as forfeiture, merger, &c.; its immediate destruction is not necessarily involved in the mode of its creation, as it must in the former case, under the same construction. There can be no necessity, therefore,

Cont. Rem.
503.

fore, to exempt the particular estate, in these cases, from the operation of merger by descent, in order to give such particular estate any existence, as there is in the former case.

Kent v.
Harpool,
1 Vent. 306.
Jones, 76.

§ 26. *A.* the father, being tenant for life, remainder to his son *B.* for life, remainder to the first son of *B.* in tail, remainder to the heirs of the body of *A.* *A.* died before any son was born to *B.*; and the court held the contingent remainder to the first son of *B.* was destroyed by the descent of the estate tail upon *B.*

Hooker v.
Hooker,
Rep. Temp.
Hard. 13.

§ 27. Lands were conveyed to the use of *A.* and his wife for life, remainder to the use of *B.* the son of *A.* for his life, remainder to the first and other sons of *B.* in tail, remainder to his daughters in tail, remainder to *A.* in fee. *A.* and his wife died in the life-time of *B.*, who afterwards died without issue, leaving a wife.

The question was, whether the wife was entitled to dower in the lands? And it was decreed she was; and the Lord Chancellor, with one of the Judges, was of opinion, that the estate for life in *B.* was merged by the descent of the inheritance upon him, and the contingent remainder destroyed.

How Re-
mainders
limited by
Way of Use
may be de-
stroyed.

§ 28. With respect to the manner in which contingent remainders limited by way of use may be destroyed, a distinction must be made between remainders limited in conveyances operating without transmutation of possession, and conveyances operating by transmutation of possession.

§ 29. As

§ 29. As to the first, we have seen, that where contingent remainders are created by a covenant to stand seised, or a bargain and sale, the seisin of the covenantor or bargainor supports or feeds the contingent remainders when they arise; and therefore if, in a case of this kind, the covenantor or bargainor conveys away his estate, before the event happens on which the remainder is to arise, but without divesting the subsequent estates, or taking away the right of entry of the persons entitled to them, and any of those persons make an entry, the subsequent uses will be revived. For, although we have seen that a present right of entry is alone sufficient to support a contingent remainder, created by a common law conveyance; yet, as there must be a seisin to a use before it can arise, it has been held, that a right of entry is not sufficient to support a contingent use, but there must be an actual entry, in order to restore the seisin out of which the use is to arise: and, therefore, any conveyance by the covenantor, which divests his estate and takes away the right of entry, will effectually destroy all contingent uses limited to arise out of such estate, by divesting the seisin out of which such contingent uses are to arise.

Where created without Transmutation of Possession.

§ 30. Lord Coke, on the marriage of his daughter with Sir *James Villers*, covenanted to stand seised of certain lands to the use of himself for life, remainder to the use of his wife for life, remainder to the use of his daughter for life, remainder to the use of the first and other sons of his daughter in tail male, with the reversion in fee to himself. Sometime after this settlement was made, Lord Coke, by deed reciting the settle-

Wegg v. Villers,
2 Roll. Ab.
796.
2 Sid. 64.
1 Vent. 188.

ment, granted his reversion in fee to a stranger, without consideration; and soon after he made a feoffment of the lands, with livery of seisin. After the death of Lord *Coke*, his wife entered, and died seised, having survived the daughter.

A question arose, whether the contingent use which was limited to the first son of the daughter, was destroyed or not, by Lord *Coke's* grant of the reversion, or feoffment of the land?

After great consideration, it was resolved, that the grant of the reversion did not destroy the contingent use; for as it was made without consideration, and the uses of the settlement were recited in it, there was both privity of estate and confidence in the person; so that the grantee of the reversion stood seised to the former uses. As to the feoffment, it was agreed, that it divested all the estates, and among the rest the seisin of the grantee of the reversion, but did not bar the entry of the grantee of the reversion; and, therefore, when the wife entered after the death of Lord *Coke*, she thereby reinstated all the divested estates, and among the rest the estate and seisin of the grantee of the reversion, which was the estate and seisin that was to serve the contingent uses.

2 Sid. 159. If the feoffment had been made before the grant of the reversion, the contingent uses would have been forever destroyed; for the only seisin which could support them was that of Lord *Coke*, which would have been destroyed by the feoffment; but Lord *Coke* had already transferred

transferred that seisin to the grantee of the reversion. If Lord *Coke* had not departed with that seisin, the contingent uses must have been for ever destroyed, as no entry by his wife or daughter could have re-vested the original seisin of Lord *Coke*, nor could he himself have entered against his own feoffment.

§ 31. Lord *Coke* was compelled to make this settlement by an order of the council; but that he might have the power of preserving or defeating the contingent uses, he made this grant and feoffment, with an intention, in case he chose to preserve the contingent uses, to destroy the feoffment and produce the grant: but if he thought proper to defeat the contingent uses, then to destroy the grant and produce the feoffment. But death prevented him from carrying this ingenious scheme into execution.

Gilb. Uses,
194.

§ 32. With respect to the manner in which contingent remainders created in conveyances to uses, operating by transmutation of possession, may be destroyed, we have seen, that in cases where the estate is transferred to feoffees or releasees, the contingent uses limited upon such conveyances are supported by the possibility of entry, or *scintilla juris*, existing in the feoffees or releasees to uses. But this possibility of entry, or *scintilla juris*, must continue undisturbed until the event happens on which the contingent use is to arise; for if the preceding estates are divested, before the event happens, then the possibility of entry or *scintilla juris* of the feoffees or releasees to uses is destroyed, as well as the other estates; and there being

Where created by
Transmutation of Possession.

no seisin to the contingent use, when the event happens on which it is limited, it can never arise, unless such possibility of entry or *scintilla juris* is re-vested.

§ 33. It follows, from this doctrine, that where particular estates limited by way of use are divested and turned to a right, all subsequent contingent uses are thereby destroyed, unless some of the persons entitled to the preceding particular estates, or the feoffees to uses or their heirs, make an actual entry, in order to re-vest the particular estates; for, otherwise, the possibility of entry or *scintilla juris* of the feoffees to uses being divested, no seisin will exist to the contingent use when it arises, and consequently the statute cannot transfer the possession.

Chudleigh's
case,
1 Rep. 120.
Poph. 70.

§ 34. Sir *Richard Chudleigh* enfeoffed several persons of his estate, to the use of the feoffees and their heirs, during the life of *Christopher Chudleigh* his eldest son (who had killed a gentleman and fled into *France*), remainder to the use of the first and other sons of his eldest son in tail. Before the eldest son had a child born, the feoffees enfeoffed him of the lands in question in fee-simple.

It was determined by a majority of the Judges in the Exchequer Chamber, that this feoffment divested all the subsequent estates, and destroyed the contingent uses limited to the first and other sons of *Christopher Chudleigh*. For although it was made without any consideration, and to a person who had notice of the uses, yet as the feoffees gained by the feoffment a new
estate

estate by wrong, which they transferred to *Christopher Chudleigh*, the privity of estate was thereby destroyed, and their seisin divested, so that there was no person seised to the contingent use when it arose.

§ 35. A person conveyed his lands by feoffment to the use of himself and wife, and to the heirs of the survivor of them. The husband afterwards made a feoffment of the land and died. It was resolved, that the feoffment of the husband had destroyed the future and contingent use of the fee: for whatever could accrue at the time of the death of the person who died first, could not afterwards by any act be revived, but was absolutely extinguished. And this judgment was affirmed in the Exchequer Chamber.

Biggot v. Smith,
Cro. Car.
102.

1 *Ld. Raym.*
316.

§ 36. A man made a feoffment in fee, to the use of himself for life, and afterwards to the use of his first son and his heirs. The father and the feoffees before issue born enfeoffed for money J. S. and his heirs of the lands, who had no notice of the former use.

Anon.
2 *Leon.* 178.
3 ——— 252.
4 ——— 233.

No judgment appears to have been given in this case; but the majority of the Judges were of opinion, that the use limited to the first son was destroyed; for the seisin out of which it was to arise was divested by the feoffment to J. S.

§ 37. One of the principal objects of the Judges in *Chudleigh's* case was, to construe contingent uses limited upon a preceding estate of freehold, according to the same rules, and to make them liable to be destroyed in

the same manner, as contingent remainders limited by common law conveyances. And they so far succeeded, that the only difference between a contingent remainder, and a contingent use limited upon a preceding estate of freehold, is, that a right of entry alone is sufficient to support a contingent remainder; whereas, if a contingent use limited upon a preceding estate of freehold be suspended, there must be an actual entry by some person having a preceding estate of freehold, or by the feoffees or releasees to uses, in order to re-vest the possibility of entry or *scintilla juris* of the feoffees or releasees to uses.

4th edit.
435. 442.

§ 38. This doctrine has been questioned by Mr. *Fearne*, in his essay on contingent remainders. But, however just his observations may appear, yet as the authority of the preceding cases has never been contradicted, the law must be taken as is here stated.

How spring-
ing and
shifting Uses
may be de-
stroyed.

1 Rep. 136a.

§ 39. With respect to the manner in which springing and shifting uses may be destroyed, as there must be a seisin to every contingent use, when it arises, or a possibility of entry or *scintilla juris* in the feoffees or releasees to uses, it follows, that if such seisin or possibility of entry is divested, before the event happens on which the springing or shifting use is to arise, it will be destroyed.

Brent's case,
2 Leon. 14.
Dyer, 340a.

§ 40. A person made a feoffment to the use of D. his wife for her life, and, in case the feoffor should survive his said wife, then to the use of the feoffor and such

such person as he should happen to marry, for their lives, remainder to a stranger in fee. The person in remainder, together with the feoffees, by the consent of the feoffor, made a feoffment of the lands to new feoffees, and to other uses, and the feoffor levied a fine to the new uses. *D.* the wife of the feoffor died, and, afterwards, he married a second wife, and died. The second wife entered, claiming under the first feoffment. *Mounson* and *Harper* were of opinion, that her entry was lawful; but *Dyer* and *Manwood* contended, that the contingent use limited to her by the first feoffment, was destroyed by the second feoffment and fine; because the seisin of the first feoffees was thereby divested. Judgment was entered for the widow by assent of the parties. But in *Chudleigh's* case, *Anderson* is reported by Lord Chief Justice *Popham* to have said, Poph. 76.
 “ And for *Brent's* case, I have always taken the better opinion to be, that the wife cannot take in that case, for the mean disturbance, notwithstanding the judgment which is entered thereupon, which was by assent of the parties, and given only upon a default made after an adjournment upon the demurrer.”
 And, in the same case, Lord *Coke* reports, that *Gawdy* 1 Rep. 136a.
 said of *Brent's* case, “ if the husband makes a feoffment in fee, before the taking wife, the wife shall never take, for the possession and estate of the land is altered, changed, and transferred to the possession of another, before the title of the wife doth accrue. But if no divesting or alteration had been, then the use shall vest in the wife.”

Gilb. Uses,
126.

§ 41. A devise of land, out of which a future use is limited, will destroy such future use: but a devise of portions out of land will not destroy a future use, for such a devise does not alter the freehold.

Strangeways
v. Newton,
Moo. 731.

§ 42. *A.* levied a fine to the use of himself and his heirs, till a marriage had between *B.* his son and *M.*, and, after, to the use of *A.* for life, remainder to *B.* in tail, &c. *A.*, by his will, devised portions to his daughters out of the land, and died before the marriage of his son. Afterwards the marriage took effect. The two Chief Justices refused, on account of the difficulty, to resolve the case: they, however, inclined clearly, that if there had been a devise of the land, it would have interrupted the rising of the future use. But they doubted, because he devised portions out of the land only, and did not devise the land.

Gilb. Uses,
126.

§ 43. Where future uses are limited, and the freehold is not conveyed away or divested, but only a term for years is limited, or a rent granted out of the lands, the future uses will not be totally destroyed; because the seisin out of which they are to arise is not divested; but such lease or rent will bind the future uses.

Wood v.
Reignold,
Cro Eliz.
764.

§ 44. Sir *John Russell* covenanted by indenture, in consideration of a marriage to be had between him and Lady *Russell*, to stand seised to the use of himself and his heirs, until the marriage, and after, to the use of himself and Lady *Russell*, and the heirs of his body, with remainders over. After the execution of this deed,

deed, but before the marriage, Sir *John Russell* made a lease of the lands for 31 years, to commence from the determination of a former term. The marriage took effect, and, upon the death of Sir *John Russell*, his widow entered. The question was, whether her entry was lawful or not?

Tanfield.—“ The point is double; 1st, Whether
“ the lease shall destroy the future use? 2d, If it shall
“ not destroy it, whether it shall not bind the future
“ use? for it ought to arise out of the estate which the
“ covenantor had at the time of the covenant; which
“ estate ought to continue without alteration till the
“ time that the use shall arise, which is not here, for
“ this is a term in reversion. To the second, this lease
“ made upon good consideration before the use did
“ arise, shall bind it; for the use shall not otherwise be
“ executed, than if it had been at the common law.
“ And a lease made *bonâ fide* to one who had not no-
“ tice thereof, shall bind it.”

Popham.—“ The statute executes only uses *in esse*,
“ and not any contingent uses, until they happen *in*
“ *esse*; then this use was merely void until marriage,
“ for there was not any new estate in him; and if he,
“ after that covenant, had made a feoffment or a gift in
“ tail, to one who had not any notice thereof, it would,
“ questionless, never have arisen. And as at the com-
“ mon law, feoffees might destroy uses *in esse*, so, now,
“ may he, out of whose estate a future use is to be
“ raised; for the freehold is destroyed out of which it
“ should

Ante, l. 42.

“ should arise ; and, whether the lease for years should
 “ altogether destroy the arising thereof, is not in this
 “ case material : but, clearly, it shall bind the con-
 “ tingent use ; and so resolved in *Strangewick's* case.
 “ And at the common law, it is clear, that the *cestui-*
 “ *que* use shall not avoid such a lease, made by the
 “ feoffees upon a good consideration, no more than a
 “ contingent use at this day.”

Fenner agreed, “ That if a freehold be conveyed to
 “ one upon consideration, the future use shall not arise ;
 “ for there is not any person seised to that use when
 “ it should arise. But this lease will not destroy or
 “ hinder it, for the same freehold remains, and the
 “ use is annexed to the lease, and, therefore, the lease
 “ shall not disturb nor bind it.”

Clench “ agreed with him for this last reason, but
 “ it was adjourned.”

Cro. Eliz.
854.

This case appears to have been again argued in 43
 and 44 *Eliz.*, when *Gawdy*, *Popham*, and *Clench* held,
 “ that the lease made, (whereout the use did arise),
 “ was good, and should bind the future use, as a lease
 “ by feoffees made upon a good consideration shall
 “ bind *cestuique* use at the common law. But it shall
 “ not destroy the whole future use, but shall stand for
 “ the freehold, because the seisin is not changed.”
 “ And *Popham* said, “ that he had conferred with di-
 “ vers of the other Justices at *Serjeant's Inn*, who agreed
 “ with this opinion.” But *Fenner* *è contra*, “ because
 “ the

“ the lease did not disturb the freehold when the use
 “ is executed : this shall relate to the limitation, and
 “ shall bind all mean acts, and therefore shall not bind
 “ the feme. Wherefore it was adjourned.

§ 45. In another case which was argued about the same period as the preceding one, *Popbam* and *Anderson* appear to have been clearly of opinion, that a lease for years would prevent the arising of a future use. But, in the following case, the contrary doctrine seems to have prevailed.

Barton's case,
Moo. 743.

§ 46. Sir *Henry Winston* covenanted by indenture, in consideration of natural love and affection to *William Winston* his eldest son, to stand seised to the use of his said son for life, remainder to such wife as he should marry, for life, remainder over. Afterwards, the said *William Winston* being unthrifty, and in *Gloucester* jail, Sir *Henry Winston*, to disturb the rising of the use to the woman whom he should marry, made a lease of the land for 1000 years to his younger son. *William Winston* married the jailor's daughter, and died without issue ; and the question was, whether this lease was good against his widow ?

Bould v.
Winston,
Cro. Ja. 168.

Croke reports the court to have been of opinion, that the lease, should not bind the estate of the wife, because there was a good estate by the first limitation, which, if not destroyed, could not be charged or incumbered after it was raised ; for it had relation to the first covenant, and none had interest to charge it : and that the
 lease

lease should not destroy it, but must be construed to arise out of the reversion, which Sir *Henry Winston* had, and might lawfully charge.

Bolls v.
Winston,
Noy, 122.
Gilb. Uses,
138.

Noy, who has reported this case by another name, says, the court thought the lease for years did not hinder the raising of the contingent use, but that the lease, in this case, took effect as a future interest, out of the fee that was in the covenantor, after the estate determined: and, at the worst, the wife should have the reversion and rent during her life.

TITLE XVI.

REMAINDER.

CHAP. VII.

Of Trustees to preserve Contingent Remainders.

- | | |
|---|--|
| <p>§ 1. <i>Invention of.</i>
 6. <i>Where they join in a Conveyance it is a Breach of Trust.</i>
 8. <i>Sometimes not punished for destroying Remainders.</i></p> | <p>11. <i>Sometimes directed to join.</i>
 16. <i>Cases where the Court has refused to give such Direction.</i>
 23. <i>Bound to preserve the Timber, Mines, &c.</i></p> |
|---|--|

Section 1.

CONTINGENT remainders being liable to be defeated by the alienation or forfeiture of the tenant for life, and also by the various modes before mentioned, a mode of preventing this inconvenience was invented, by limiting an estate to trustees and their heirs, to commence from the determination of the particular estate, by forfeiture or otherwise, in the life-time of the tenant for life, and to continue during the life of the tenant for life, upon trust to support the contingent remainders afterwards limited, from being defeated or destroyed : by which means, if the tenant for life should alien or forfeit his estate, or if it should be merged or destroyed by any other means, the trustees having a vested remainder, immediately acquire a right of entry, which is sufficient to support the contingent remainders.

Invention of.

Vide Garth
v. Cotton,
Infra.

Ch. 1, f. 36.

§ 2. This

2 Comm.
172.

§ 2. This improvement is generally attributed to Sir Orlando Bridgeman and Sir Geoffrey Palmer, who retired from the Bar during the civil wars, and confined themselves to conveyancing. And when, after the restoration, these persons came to fill the first offices of the law, they supported this invention, within reasonable and proper bounds, and introduced it into general use.

Ch. 6.

§ 3. A limitation of this kind is as necessary where contingent remainders are created by way of use, as where they are limited by a common law conveyance: for, if the uses are divested, we have seen that an actual entry by the feoffees or releasees to uses, or by some person having a preceding vested estate, is necessary to re-vest the contingent uses.

Vide Tit. 32.

§ 4. It should be observed, that where an estate is limited in a bargain and sale, or covenant to stand seised, to a stranger, upon trust to preserve contingent remainders, it will be void: because no use will arise under these conveyances without a consideration.

Ante, ch. 6.

§ 5. Where the legal estate is vested in trustees, and the contingent limitations are only trusts, there is no necessity to limit an estate to trustees to preserve the contingent estates.

Where they
join in a
Conveyance,
it is a breach
of Trust.

§ 6. It was declared by Lord Keeper *Harcourt*, that where there were trustees appointed by will to preserve contingent remainders, and they, before the birth of a son, joined in a conveyance to destroy the remainders,

ders, this was a plain breach of trust ; and any person taking under such conveyance, if voluntarily, or having notice, should be liable to the same trusts. And though it was objected, that this had been only *obiter* said in equity, and that there never was any precedent of a decree in such a case, Lord Keeper said, it was so very plain and reasonable, that if there was no precedent in this case, he would make one.

Pye v.
George,
1 P. Wms.
128.

§ 7. A person devised lands to trustees and their heirs, to the use of his sister for her life, remainder to the same trustees and their heirs, during the life of his sister, in trust to preserve contingent remainders, remainder to the use of the first and other sons of his sister in tail male, remainder over in fee. After the death of the testator, his sister entered, and married : and she and her husband joined with the remainder man in fee in a feoffment and fine to trustees, to the use of the husband and his heirs. The trustees, some time after, conveyed the estate by lease and release to the husband of the devisee for life in fee, his wife being at that time *ensient* with a son. A bill was filed by the son, after the death of his mother, to have the benefit of the will of his uncle.

Mansell v.
Mansell,
2 P. Wms.
678.
Forrest. R.
252.

It was resolved by Lord Chancellor *King*, with the concurrence of Lord Chief Justice *Raymond*, and Lord Chief Baron *Reynolds*, 1st, That the feoffment and fine by the devisee for life, and her husband, did not destroy the contingent remainders to the first and other sons ; but that the right to the freehold in the trustees did support them.

2dly,

2dly, That when the trustees joined in the lease and release to the husband of the devisee for life, and his heirs, this destroyed the contingent remainders.

3dly, That the joining of the trustees to destroy such remainders, was a plain breach of trust; and, though this had not been before judicially determined, yet it seemed to the court, in common sense, reason, and justice, to be capable of no other construction: for, when trustees are appointed to preserve an estate in a family, and for no other purpose, and they, instead of preserving it, do a wilful act with an intent, and in order to destroy it, how can this be otherwise than a plain breach of trust; or how can it be rendered clearer, than by barely putting the case? Should the court hold it no breach of trust, or pass it by with impunity, it would be making proclamation, that the trustees in all the great settlements in *England*, were at liberty to destroy what they had been entrusted only to preserve.

As to the remedy, had the premises been conveyed to one without notice, and for a valuable consideration, such purchaser must have held the lands discharged of the trust, and the son of the marriage, who was injured by the breach of trust, have taken his remedy against the trustees only; who would have been decreed to purchase lands with their own money, equal in value to the lands sold, and to hold them upon the same trusts and limitations as they held those sold by them. But even in case of a purchase, if the purchaser had notice of the trust, which the trustees were subject to

as annexed to their estate, such notice would have made him liable to the same trust. So, if there had been a voluntary conveyance made of this estate, though without notice, the voluntary grantee would have stood in the place of the grantors, and have been liable to the trust, in the same manner as the trustees themselves were. But, in the present case, it was much stronger; for here was not only notice of the trust, but the conveyance itself voluntary, and made to the husband of the tenant for life: so that the lands conveyed by these trustees must remain liable to the same trusts as they were, when the trustees joined in the conveyance.

§ 8. There have been some cases wherein a court of equity has refused to punish trustees for joining in a conveyance to destroy contingent remainders: as where, upon a subsequent remainder to the right heirs, a collateral relation only has been affected by it, there having been no issue of the marriage. For, next after the parties to the marriage, the court considers the issue to be the only objects of the settlement and trusts, and pays less regard to the remainder over to the right heirs, as no immediate objects of consideration in the settlement: as also, where the application to the court for relief has been made by one who was not at the time, nor possibly ever might be, entitled to the remainder, under the words of the limitation.

Sometimes
not punished
for destroying
Remainders.

Fearne, 481.

§ 9. Thus, where a settlement was made in consideration of a marriage, and 3000*l.* fortune, and for settling the lands in question in the name and blood of the husband; and the lands were limited to trustees,

Tipping v.
Pigot,
1 Ab. Eq.
385.

in trust for the intended husband for 99 years, if he should so long live, remainder to trustees during his life, to support contingent remainders, remainder to the first and other sons of that marriage, remainder to the heirs of the body of the husband, remainder to the right heirs of the husband. The marriage took effect : and the husband and wife and trustees, to support, &c. by fine and other conveyance, settled these lands on the husband for 99 years, if he should so long live, remainder to trustees during his life, to support contingent remainders, remainder to the wife for her jointure, remainder to the first and other sons of the marriage, remainder over to several others ; and then the husband and wife died without issue. The plaintiff, being heir at law to the husband, brought his bill to set aside this second conveyance by the trustees, as being made in breach of their trust ; and insisted, that they were trustees as well for the support of this remainder, as of the remainder to the first and other sons, all being contingent remainders ; and that such conveyances ought to be set aside, as had been the practice of the court.

The Chancellor held it to be so, as to the first and other sons, who came in, and were to be considered as purchasers under the marriage settlement and portion, and said it would be dangerous for any trustees to make the experiment, for that it was most certainly a breach of trust ; and, if it should ever come in question, he thought the court would set aside such a conveyance ; not but that, he said, the case might possibly be so circumstanced, as that the court would not
relieve

relieve against it; but where relief was to be given in such case, it was only to those who came in and claimed as purchasers, as the first and other sons: but all the remainders after, to the heirs of the body of the husband, and to his right heirs, were merely voluntary, and not to be aided in equity; and, therefore, dismissed the bill.

§ 10. *A.* made a settlement to the use of himself for 99 years, if he so long lived, remainder to trustees and their heirs during his life, to preserve contingent remainders, remainder to the use of the heirs of his body, remainder to himself in fee. *A.* had two sons; and *A.* and the trustees, together with the eldest son, joined in a feoffment and fine to *B.* in fee, as a security for a sum of money. The eldest son died without issue, and the second son brought a bill to set aside the mortgage.

Else v. Osborn,
1 P. Wms.
387.

Lord Chancellor *Cowper* said, this was plainly a contingent remainder, being limited to the heirs of the body of *A.*, who could have no heir during his life, for *nemo est hæres viventis*: and it was as plain, that the feoffment did, at law, destroy the contingent remainder, in regard the trustees who had the freehold, joined. But it might be a question, whether this was a breach of trust in the trustees. It was true, if the eldest son joined in a feoffment, where the remainder in tail was limited to the eldest son, it prevented any breach of trust in the trustees: but here, the limitation being to the heirs of the body of *A.*,

2 P. Wms.
683.

who could not have an heir of his body during his own life, therefore, the joining of the eldest son was not, in this case, so material: and yet it seemed hard, when the heir apparent joined in a case where it would be no breach of trust, if the limitation were to the eldest son, that it should be a breach of trust, in respect to the limitation to the heir. But the trustees appointed to preserve the contingent remainders, ought not to join in destroying those remainders, which would be acting the reverse of their trust.

His Lordship was, however, of opinion, that the second son, though he had survived the eldest, had no right to bring a bill in his father's life-time; for he neither was, nor possibly ever would be, the heir of his father, unless he survived his father, which was uncertain.

Sometimes
directed to
join.

Fearne, 483.

§ 11. There are also, instances, of a court of equity exercising a discretionary power of directing trustees for preserving contingent remainders, to join with the tenant for life, or his first son, in barring the subsequent contingent limitations. But this has only happened under peculiar circumstances, either of pressure to discharge incumbrances prior to the settlement, or in favor of creditors, where the settlement was voluntary, or for the advantage of the persons who were the first objects of the settlement, as to enable the eldest son to make a settlement upon an advantageous marriage.

§ 12. The

§ 12. The defendant, *Richard Sprigg*, made a mortgage of the lands in question for the term of 1000 years to secure 1000 l., and also confessed a judgment for 150 l., and afterwards, upon his marriage, settled the same lands to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder to his wife for life, remainder to his first and other sons in tail, remainder to his own right heirs. There being no issue of the marriage, *Sprigg* articted to sell the lands to the plaintiff, who brought his bill, setting out these facts, and that the trustees refused to join, and the mortgagee threatened to enter ; and prayed a specific execution of the agreement, and that the trustees might join in conveyances. *Sprigg* and his wife, by their answer, set out the settlement ; that they had been married six years, and had no issue ; confessed the contract with the plaintiff, and were willing to perform it. The trustees set out the marriage settlement, and were willing to do what the court should direct, being indemnified.

Platt v.
Sprigg,
2 Vern. 303.

For the plaintiff, it was insisted, that the settlement being only of an equity of redemption, the mortgagee was not bound thereby, but might enter and foreclose, which would bind, though there should be issue afterwards born : and the husband and wife not being able to redeem, a sale was absolutely necessary, otherwise the benefit of redemption would be lost, as well to the husband and wife, as to the issue, in case there should be any,

The Master of the Rolls decreed the trustees to join, and to be indemnified, the settlement being only of an equity of redemption, the wife being in court and examined whether she freely consented thereto or not.

Fruvin v.
Charleton,
1 Ab. Eq.
386.

§ 13. *J. S.*, by marriage settlement, was tenant for 99 years, if he should so long live, remainder to trustees and their heirs during his life, to support contingent remainders, remainder to his first and other sons in tail male, remainder to trustees for 500 years in trust to raise portions for daughters, if there were no issue male. *J. S.* had issue a son, who being of age and about to marry, he and his father brought a bill to have the trustees to join in making an estate, in order to suffer a common recovery, that he might be enabled to make a settlement on his marriage. And it was urged, that the trustees were only trustees for the son, and ought to execute estates as he should direct, he having the inheritance in him; and that the end of the trust was, to hinder the father from defeating the son of the estate. On the other side, it was said, that these trustees were not only trustees for the eldest son, but were designed as a guard for the whole settlement; that the mother being living, there might be other children, and, for the trustees to join, would be a breach of trust.

There being a daughter in this case, Lord *Harcourt* directed that, upon giving security for the daughter's portion, the trustees should join in the recovery.

§ 14. A person

§ 14. A person, after marriage, made a voluntary settlement of his lands to himself for life, remainder to trustees to support contingent remainders, remainder to his first and other sons in tail successively, remainder to himself in fee; and, contracting debts, he afterwards made a conveyance of his estate to other trustees for payment of those debts.

Baffett v. Clapham,
1 P. Wms.
358.

The creditors brought their bill, and *inter alia* insisted, that the trustees for preserving contingent remainders should join in the sale to destroy the contingent remainders: and this came on by consent before Sir *Joseph Jekyll*, who took time to consider of it, alleging, that though, in the case of Sir *Thomas Tippen*, where trustees had joined in cutting off remainders created by a voluntary settlement, the court, on a bill brought by a remote relation, had refused to punish them, as distinguishing between a voluntary settlement, and one made on a valuable consideration; yet he had not known a precedent where the court ever decreed the trustees to join in destroying the contingent remainders, this being the reverse of the purpose for which they were at first instituted.

Ante, f. 9.

§ 15. Upon the marriage of the plaintiff Mr. *Winnington*, who was eldest son of Sir *Francis Winnington*, the family estate was settled upon the plaintiff for 99 years, if he should so long live, remainder to trustees during his life, remainder to the first and other sons of that marriage in tail male, remainder to the first and other sons of any other marriage, remainder over.

Winnington v. Foley,
1 P. Wms.
536.

Mr. *Winnington* had by his lady, (who was then dead), one son, who was come of age, and was in treaty for a marriage, and the surviving trustee for preserving contingent remainders being dead, leaving an infant heir, the father and son brought a bill against the infant heir, that he might join in making a tenant to the *præcipe*, in order to ^{suffer} a common recovery for making a settlement upon the son's marriage.

On the hearing, the Lord Chancellor declared, that the trustee being appointed to preserve contingent remainders, and here being a vested remainder in tail, if this were for the good of the family, he did not see but such trustee might lawfully join. But his Lordship referred it to the Master to state, whether this was for the good of the family.

The Master reported, that the son was in treaty for the marriage above mentioned ; that it was a beneficial marriage for the family ; and that it was necessary a new settlement should be made of the estate, which could not be done without a recovery.

Lord Chancellor *Parker* said, it might be greatly mischievous to a family if such a trustee should stand out, and not join with the father and son, in cutting off the old settlement and making a new one. This was plainly for the benefit of the family, for, by the intended settlement, the son was to be but tenant for life, instead of tenant in tail ; so that it was a means of preserving the estate longer in the family. Also, the
wife

wife of Mr. *Winnington* the father being dead, there was an end of the contingent remainders by that marriage; and as to any remainders by another marriage, no remainder not *in esse* ought to be so much regarded as the remainder in tail, which was actually vested in Mr. *Winnington* the son.

His Lordship directed that the trustee should join with the father and son, in order to make a new settlement, and that the Master should direct a proper conveyance, in which the trustee should join.

§ 16. But however the Court of Chancery may judge it proper to direct trustees to concur in destroying contingent remainders, under circumstances like those in the above-mentioned cases, it has repeatedly denied the same interposition, in cases where such ingredients were wanting.

Cases where the Court has refused to give such Direction.

§ 17. By a marriage settlement, lands were settled on the husband and wife for life, remainder to trustees to preserve contingent remainders, remainder to their first and every other son in tail male. And the husband and wife having been married twelve years, and having no issue, and having contracted debts, they brought a bill, praying that they might be enabled to sell part of the lands for payment of the debts; and the trustee consented, provided he might be indemnified. And though it was urged that there were precedents of like cases, yet the Lord Chancellor refused to make any such decree; saying, he had known people married near

Davies v. Weld,
1 Ab. Eq.
386.

near twenty years without issue, and after had children. .

Townsend v.
Lawton,
2 P. Wms.
379.

§ 18. By a settlement on the marriage of the defendant *John Lawton* senior, lands were limited to his use for 99 years, if he should so long live, remainder to the defendant *Montague* and other trustees, (of which *Montague* was the survivor), for the life of *John Lawton* senior, to preserve contingent remainders; remainder to his wife for life, remainder to the first and other sons of the marriage in tail male, remainder over.

The wife was dead, and the defendants *Edward* and *John Lawton* were the only issue of the marriage; and the defendant *John Lawton* the father having mortgaged the premises to the plaintiff, and *Edward Lawton* the son being come of age, the father and son entered into articles with the plaintiff, and thereby covenanted that they would suffer a recovery, and procure Mr. *Montague* the surviving trustee to join therein. But Mr. *Montague* refusing, the plaintiff brought his bill to compel a specific performance of the covenant, and that Mr. *Montague* might join in suffering the recovery.

Lord Chancellor *King* asked if the younger brother would consent that the trustee should join? and being told that he would not, his Lordship said, then he would not decree the trustee to join, for that he would not take away any man's right.

It

It was insisted, that the same was done in the case of *Winnington v. Foley*; to which his Lordship said, he would also do so, were the like case to come before him: in that case the trustee was decreed to join, in order to preserve the estate in the family; but in the principal case they would have the same done, with a view only to alien. Ante, f. 15.

The bill was dismissed.

§ 19. A bill was brought to compel trustees to join in a sale, which would destroy the contingent remainders, and likewise the uses made before marriage. The limitations were to the husband for 99 years, if he so long lived, remainder to the wife for her life, remainder to trustees to preserve contingent remainders, remainder to the heirs begotten on the body of the wife, remainder to the heirs of the husband: and the first declaration under it was, that it was the intention of the settlement to make a provision for the children of the marriage. Symance v. Tattam,
1 Atk. 613.

Lord *Hardwicke* said, there were many cases in which the court would compel the trustees to join in such a conveyance as would destroy contingent remainders; but then it must be in some measure to answer the uses originally intended by the settlement; and had been usually done in the case of old settlements only, as in *Winnington v. Foley*. But he believed there was no instance where they had compelled such trustees to join with the father, termor for 99 years, and the son to sell the estate. Ante, f. 15.

§ 20. Sir

Woodhouse
v. Hoskins,
Forrest. MS.
3 Atk. 22.

§ 20. Sir *John Hoskins* devised his real estate to his eldest son *Bennet Hoskins* for 99 years, if he should so long live, remainder to trustees during the life of *Bennet* to preserve contingent remainders, remainder to the first and other sons of *Bennet* in tail male; remainder to the testator's second son *Hungerford Hoskins* for 99 years, if he should so long live, remainder to trustees during the life of *Hungerford* to preserve contingent remainders, remainder to his first and other sons in tail male, with like remainder to his younger sons *John*, *George*, and *Thomas*, remainder to his own right heirs. And the testator empowered his sons to revoke the uses limited by his will, and to appoint new uses, provided they limited the same to their sons for 99 years, and in strict settlement, with several other powers and directions for the effectuating his intention of preserving the estate in his family.

Bennet Hoskins died without issue, and the defendant Sir *Hungerford Hoskins* coming into possession of the estate, had issue an only son *Chandos Hoskins*, who had attained his age of 21, and borrowing several sums of money from the plaintiffs, for which he and his son became bound. Soon after the son's being thus bound for his father, articles were entered into between Sir *Hungerford* and *Chandos Hoskins* on the one part, and the plaintiffs on the other, whereby after reciting the debts, and that *Chandos* was bound for the payment of them as surety for his father; Sir *Hungerford* and *Chandos* covenanted with the plaintiffs to convey the estate in question to them and their heirs, upon trust
to

to sell the same, and apply the money to the payment of their debts, and to pay the surplus thereof to Sir *Hungerford*.

The bill was brought against Sir *Hungerford* and *Chandos* for a specific performance of the articles, and likewise against the heir of the surviving trustee for preserving contingent remainders, that he should join in a conveyance for making a tenant to the *præcipe*, in order to the suffering a recovery; and also to have the power of revocation declared void as to all the remainder-men under the will of Sir *John Hoskins*.

Lord *Hardwicke*,—"Had this case depended upon the power of revocation, I should not have determined it without the assistance of the Judges; but the previous point is, whether the court will compel the trustees to join in enabling the father and son to suffer a recovery. Indeed, thus much use may be made of the power of revocation, that it plainly shews Sir *John Hoskins* intended to make as strict a settlement as he could, and to preserve the estate in his name and blood as long as he was able; and where clauses of this nature tending to perpetuities have been inserted in deeds or wills, it has been a prevailing motive with the court to supply defects in other parts of the deeds or wills, and to make as strict a settlement as possible, as was done by Lord *Cowper* in Lord *Stamford* v. *John Hobart's* case upon Serjeant *Maynard's* will, where trustees for contingent remainders were inserted by the court.

"It has been admitted in the present case, that there is no precedent for such a decree as is prayed by the
the

Ante.

the bill; and I do not think the present case such as will warrant me in making one. Trustees of this kind have often been called *honorary trustees*, i. e. that such a trust is reposed in them as they may exercise at discretion; and that therefore the court ought not to consider them as guilty of a breach of a trust for such exercise of their discretion; but since the case of *Mansel v. Mansel*, where it was determined to be a breach of trust, and to affect a purchaser with notice, that notion has been laid aside. I will not say that the court would decree the trustees' joining in such a case as the present to make a tenant to the *præcipe* a breach of trust in them, that being a quite different question.

“ It has been said, that this kind of settlement, where the father is made but tenant for years, is very inconvenient, and tends to perpetuities; but I do not know that this doctrine has been ever laid down by the court. To some public purposes these settlements may be inconvenient; however, they were formerly very common, and no objection made to the propriety of them. Now, what was the reason of such a limitation? Most certainly to preserve the estate longer from alienation than if the father was made tenant for life; because, in this last case, the father and son might pass by the trustees, and suffer a recovery without them, and therefore the estate was limited for years to prevent that consequence; and also, for that the son being greatly under the father's power for his maintenance, the father might distress, and force him to join in selling the estate, where the freehold is in the father; whereas, by vesting the freehold in trustees, that consequence is

is likewise avoided. Now, the occasion for suffering a recovery in the present case is considerable:—It is not for the making any marriage settlement, nor upon account of any particular misfortune in the family, nor for payment of the son's debts, but for payment of the father's, the son being only a surety for the father, and entering into bonds but just before the making of the articles; and it is very probable the estate was settled in this manner by Sir *John Hoskins*, to guard against the very event of the son's being drawn into a sale of the estate for payment of the father's debts. It has been said, that the son, as tenant in tail, is owner of the estate, and that it is not necessary to make the subsequent remainder-man party to bills relating to his estate. But where a man is only tenant in tail in remainder, and has not the freehold in him, I do not think he is to be considered as owner; and, in all cases, the owner of the freehold must be before the court. The precedents of decreeing trustees to join in suffering recoveries, are not many, and have not gone so far as the present case. In that of *Mr. Winnington*, the end was the making a marriage settlement, which was carrying on the donor's intention, and not to put the estate out of the family. It was objected, that the trustees' joining with the father, would be no breach of trust in them, and that the court would not decree them to make satisfaction, nor affect a purchaser with the trust; and that therefore what is prayed by the plaintiff's bill should be decreed. But there is a medium between the two propositions; for the court will not always decree a man to do what would not possibly be a breach of trust in him, if he did it. The reasons

Ante, f. 15.

reasons and motives of a trustee's joining would be considered in determining, whether he was, or was not, guilty of a breach of trust. But as the trust in question was most probably created to prevent the father and son from selling or disposing of the estate as soon as he came of age, the decreeing the trustees to join in suffering a recovery, would be decreeing them to act directly contrary to their trust."

The bill was dismissed.

Barnard v.
Large,
3 P. Wms.
674. note.
Amb. 774.

§ 21. *Francis Barnard* devised freehold and copyhold estates to *T. C. Barnard* for 99 years, if he should so long live, remainder to the defendant *Large*, during the life of *T. C. Barnard*, in trust to preserve contingent remainders, remainder to the first and other sons of *T. C. Barnard* in tail male, remainder to *J. Wall* in fee. *T. C. Barnard* had issue only one son, who attained 21 years of age; and the father and son now filed a bill against *Large* the trustee, and *Wall* the remainder-man, stating, that they were desirous of suffering a recovery, and limiting the estate, so as to preserve the contingent remainders to the second and other sons of *T. C. Barnard*, and praying that *Large* the trustee might be decreed to join in making a tenant to the *præcipe* for that purpose, submitting to declare the uses of the recovery to the second and other sons of *T. C. Barnard*, by way of contingent remainders, as limited by the will, and to limit an estate to a trustee for the purpose of supporting and preserving those contingent remainders.

His

His Honor observed, that, with respect to remainders to remote relations in *settlements*, where the persons to whom they were limited were not the immediate objects of the parties, or where they stand in opposition to the first tenant in tail, desiring a reasonable benefit consistent with the intentions of the creator of the limitations, their pretensions have not been much considered : but, in the present case, all took as volunteers, and were all equally to be attended to. His Honor then considered the several cases on this subject, and said, that from a view of them all, it seemed, that when the eldest son tenant in tail, is of age, and about to marry, and thereby *continue*, instead of *destroying*, the purposes of the settlement, and, in some cases where there has been particular distress under particular circumstances, which ought to have induced the trustee to join, the court has interfered ; otherwise, not ; that, in the principal case, he was called upon to disturb the testator's disposition merely for the sake of disturbing it, for which he saw no reason ; and dismissed the bill with costs.

§ 22. It is observable, that, in the two last cited cases, a distinction was made between punishing trustees for joining, in some cases to destroy contingent remainders, and the compelling them to join. This distinction seems to flow from the supposing any discretion at all in the trustees ; because there may be circumstances sufficient to justify, though short of an obligatory call for such an exercise of their discretion. And Mr. *Fearne* observes, that however this may be, 493.
it seems the safest way for trustees, not to act, except

2 P. Wms.
684.

in the clearest cases, without the direction of the Court of Chancery: and recommends to their discretion, the words of Lord *Harcourt* in *Pye v. George*, “ that it
“ would be a dangerous experiment for trustees, in
“ any case, to destroy remainders, which they were
“ appointed by the settlement to preserve.”

Bound to
preserve the
Timber,
mines, &c.

§ 23. Trustees to preserve contingent remainders are not only bound to preserve all the limitations created by the settlement, but also, to protect the inheritance, and to keep it as entire as possible; and as the inheritance consists of land, timber, mines, &c. all these are under the protection of the trustees; and, in the execution of this trust, they are entitled to every assistance which a court of equity can afford them. And where there is a limitation to trustees to preserve contingent remainders, the Court of Chancery will not permit a tenant for years to join with the person entitled to inheritance for the time being, to cut down timber on the estate. This doctrine is laid down by Lord *Hardwicke* in a case which has been lately published from his Lordship's written argument.

Garth v.
Sir J. Cotton,
Dickens, 183.

§ 24. *Richard Bovey Garth* being tenant for 99 years, if he should so long live, without impeachment of waste, voluntary waste excepted, with remainder to trustees during his life to preserve contingent remainders, remainder to his first and other sons in tail male, with the ultimate remainder to *Sir John Hind Cotton* in fee; and, having no children, he entered into an agreement with *Sir John Hind Cotton* for cutting down part of the timber then standing on the estate, the money

to arise from such timber to be divided between *Bovey* and Sir *J. H. Cotton*.

A quantity of timber was felled in consequence of this agreement, and Sir *J. H. Cotton* received a part of the money.

Some years after, *Bovey* had a son, who, after the death of his father, suffered a recovery, and filed his bill against Sir *J. H. Cotton*, praying a satisfaction for so much as he had received of the money which arose from the sale of the timber.

Lord *Hardwicke*—Upon this case, the general question is, whether the plaintiff is entitled to satisfaction for so much as Sir *J. H. Cotton* received out of the inheritance by the fall and sale of timber before the plaintiff came *in esse*, and, consequently, before he had any estate in him in the land, and whilst the remainder, which vested in him afterwards, rested in mere contingency or possibility.

This had been admitted at the bar to be entirely a new question, upon which there was no precedent, and which had never been brought into judgment before: that the plaintiff could have no remedy at law, either in his own name, or in the names of the trustees to preserve contingent remainders; but that the only possible remedy was in a court of equity. This made it necessary for the court to proceed with great deliberation before a decision was made, which would be the

first precedent after the invention of trustees to preserve contingent remainders.

In order to determine whether the plaintiff was entitled to relief, it would be necessary to take several matters into consideration; to lay down some that were plain, and to clear and establish others, that appeared more doubtful.

First, That the stripping this estate of the timber was a wrongful act, was clear from the nature of the limitations. The plaintiff's father was only tenant for years, punishable for wilful waste, and had no present right to, or interest in the timber, other than the mast and shade, and necessary botes. The defendant's father had no present right to cut it down, but in his turn according to the order of limitation. It was true, the inheritance was vested in him, subject to open and let in the contingent remainder, when a son should come *in esse*; and, in that quality, the timber part of the inheritance was vested in him; but he had no present right to take and use it. The trustees, who were seised of the freehold, might have restrained him by injunction; and the plaintiff's father might have brought an action of trespass against him for his entry and tortious act. Further, it was the duty of the plaintiff's father so to have done, not only in respect of the trespass upon himself, which he might have waived, but in respect of the privity which was in expectancy between the tenant for years and the contingent remainder-man, when he should come *in esse*; for between the tenant for years
and

and the lessor, or the remainder-man of the inheritance, there was a privity: and before the statute of *quia emptores terrarum*, a tenure arose, and this made a tenant for years a kind of fiduciary for the lessor, or the remainder-man, who stood in his place. As this act was wrongful, both in the plaintiff's father and Sir J. H. Cotton, so this wrong was committed collusively between them; and it was plain and self-evident, that this wrongful collusive transaction had turned to the loss and damage of the plaintiff.

The next inquiry was, whether the plaintiff was entitled to any remedy in Chancery upon the principles of equity. At law, it was admitted, he could have none. And it must be admitted further, that if the limitation to trustees to preserve contingent remainders had been out of the case, he would have had none in equity. Indeed, as the plaintiff's father was only tenant for years, if there had not been such a limitation to the trustees, all the contingent remainders would have been void, for want of an estate of freehold to support them; and Sir J. H. Cotton would have had the immediate freehold, as well as the inheritance in him, which would have given him a clear right. But if the plaintiff's father had been tenant for life, and there had been no such limitation to the trustees, the plaintiff would even then have been entitled to no remedy, because his whole use in the land, whilst it remained in contingency, would have been in the power of the tenant for life to bar, by fine, feoffment, or surrender to the remainder-man vested: and there could have been no pretence for this court to interpose, to preserve

or restore to him part of that inheritance, the whole of which was in the power of the tenant for life; therefore, the stress and foundation of the plaintiff's equity depends entirely upon the estate limited to the trustees to preserve contingent uses, and the consequences from thence. And, in order to determine concerning the force and operation of this, in the present case, I will consider,

1st, What is the intention and use of creating limitations to trustees for preserving contingent remainders.

2dly, What estate such trustees take in point of law, and what actions they may maintain at common law.

3dly, What is the nature and extent of this trust in equity, and what remedy they may pursue in this court.

4thly, How far, and in what cases, such trustees may be charged in equity for a breach of trust, or any other person be affected by their acts, or laches, in breach of their trust.

1st, The intention of limitation to trustees to preserve contingent uses, took its rise from the determination of two great cases, reported by Lord Coke in his first volume; *Chudleigh's case*, Hil. 31. Eliz., and *Archer's case*, Mich. 39 Eliz.; though it was several years after those resolutions, before that light was struck out; and it was not brought into practice amongst conveyancers till the time of the usurpation, when, probably, the providing against forfeitures, for what was then

then called treason and delinquency, was an additional motive to it.

Let us see, then, what were the chasms and defects which wanted to be filled up and remedied in consequence of those two judgments.

The grand dispute in *Chudleigh's* case was concerning the power of feoffees to uses, created since the statute of 27 *Hen.* 8. c. 10., to destroy contingent uses by fine or feoffment, before the contingent use came into being.

In order to determine this, the Judges entered into very refined and speculative reasonings, some of which (I speak it with reverence) are not very easy to comprehend.

They all agreed, that where there is a conveyance to uses, to the use of the father for life, remainder to his first and every other son in tail, with remainders over; in all those cases, no estate at all is left in the feoffees, but the whole estate is divested and drawn out of them by the statute of uses.

But then came the question respecting the contingent uses to the sons not *in esse*. On the one side, though they admitted there was no estate left in the feoffees, yet they said there was a *scintilla juris*, a power of entry to preserve the contingent uses, if, by reason of disseisin, or disturbance of the estate, there should be occasion: for, say they, no use can be executed by the statute,

unless there be a person seised to the use, and also a *cestuique* use. And if any disseisin or disturbance of the estate should happen, the right to the use cannot be executed within the statute; therefore, lest these contingent uses should be destroyed, and not executed, there must, by construction of the statute, be such a power of entry left in the feoffees and their heirs.

This was the opinion of the greatest part of the Judges.

Others of the Judges were of opinion, that there was not only no estate left in the feoffees, but no power or right to enter, nor any thing to do with the land; but that they were at first only conduit pipes, and the estate that was in them, was, by the statute, wholly transferred to serve the uses which were *in esse*, with a pregnancy and prospect to the contingent remainders, if they should arise in due time.

It must be observed, that one thing which weighed much with the majority of the Judges to be of opinion for leaving a right of entry in the feoffees to preserve the contingent uses, was, their fear of perpetuities, and of having contingent estates by way of use in persons not *in esse*, if they should not be destroyable by the feoffees; for this doctrine, as it left it in the power of the feoffees to preserve the contingent uses, so it put it into their power to destroy them, if they pleased.

The reason of which was, that, at that time, the law was not settled that the destruction of the particular estate
by

by the feoffment, or conveyance of the *cestui que* use for life, before the contingent remainders became vested, was a destruction of the contingent remainders: but afterwards came *Archer's* case, in which case, this point was solemnly settled, and they were relieved from their apprehensions; for though *Archer's* case is placed in the reports before *Chudleigh's* case, it was not determined until some years afterwards.

The clearest summary of the reasoning in those cases, is stated by Mr. *Pollexfen*, in his argument of the case of *Hales* against *Risley* in *Pollexfen*, 385, from whence I have taken it.

From this deduction, you will see what were the chasms and defects to be supplied.

Here was, then, understood to be a power in the general feoffees to uses, either to preserve or destroy those uses *ad libitum*, and here was a power in the *cestuique* use for life to destroy them.

How were those defects to be supplied and filled up? By vesting a limitation in certain trustees *eo nomine*, upon an express trust to support them. But how to support them? By preserving the whole inheritance to come entire to the *cestuique* use in contingency, in like manner as trustees to uses ought to do before the statute of uses, when they were but trusts to be executed in this court. And, as things then stood, such trustees, having the whole legal estate, might and ought to preserve the entire inheritance, whether consisting of
the

the lands, mines, or timber, for the benefit of all the *cestuique* trusts in remainder, either vested or contingent.

Secondly, consider, in the next place, what such trustees take in point of law, and what actions they may maintain at common law.

It hath formerly been attempted to be brought in question, whether, upon such a limitation to trustees, after a prior limitation for life, they took any estate at all in the land, or only a right of entry on the forfeiture, or surrender of the first tenant for life, by reason that the limitation being only during his life, could not commence or take effect after his death.

But this was soon settled on the authority of *Cholmondeley's case*, 2 *Coke*, 5 *a.* where it is held, that if there is a lease to *A.* for life, remainder to another during the life of *A.*, this is a good remainder; for, by possibility, the remainder may take effect in case a tenant for life makes a feoffment in fee, or commits any other forfeiture; and so in the Book 41 *E.* 3. *Fitzh.* Title *Waste*, 83.; and this is followed by the late case of *Duncomb* against *Duncomb*, Hil. 7 *Wm.* 3. *C. B.* 3 *Lev.* 437., which was one of the first cases wherein the operation of such limitation to trustees to preserve contingent uses came into question.

If this be so, upon such a limitation, after a prior estate for life, it holds much more strongly when limited after a prior estate for years only, determinable on the
life

life of the first tenant; because, in the last case, it comes the first estate of freehold to the trustees, as was rightly reasoned by Lord Chief Justice *Lee*, in the case of *Smith v. Dormer*, and *Parkhurst*. Ante, ch. i. f. 38.

It is plain, therefore, that these trustees had the immediate freehold in them, an estate *pur autre vie*; and at law they alone could maintain or defend any action concerning the freehold.

If a disseisin was committed, they must bring the assize, and they must defend in all *præcipes*; for the possession of the tenant for years was, in law, their possession: for this reason, they had in law an interest in the timber; not indeed to cut down or destroy, but in respect of the enjoyment by their tenant for years, and of the expectancy of its coming into their actual possession by the determination of his estate, as part of their freehold.

Notwithstanding all this, it is certain that they could maintain no action of waste: the reason of which is, that the common law gave the prohibition of waste only to an owner of the inheritance; and the statute of *Gloucester* gave the writ of waste to the same persons. But in this respect, such trustees are in no other condition than all other remainder-men for life.

Thirdly, consider, in the next place, what is the nature and extent of their trust in equity, and what remedies they may pursue in this court.

And

And I hold it to be agreeable to natural justice, and in support of right to construe their trust in the most liberal manner. In the case of *Mansell against Mansell*, which must be more particularly mentioned by and by, it was expressly laid down by Lord *Raymond*, as I took it from his own mouth: "It is only
 " positive law, that tenant for life may destroy con-
 " tingent remainders, and therefore it was a very con-
 " siderable invention to create these trusts to preserve
 " them; they are the creature of the court, and pro-
 " perly under its direction and control."

The first trust is declared to preserve the contingent estates therein-after limited. How to preserve them? To preserve the inheritance as entire as possible, to go according to the succession established by the testator, which inheritance consists of the land, timber, and mines, and cannot be preserved entire without preserving all three. In many estates, the timber is the most valuable part, in more, the mines; and the destruction of one, or the exhausting of the other, might take away or be an alienation of the best part of the inheritance.

But it hath been objected, that this relates only to the preservation of the legal estate of the use, and not to the timber or mines, because the estate of the trustees cannot support any action of waste.

This might, in many instances, be to preserve the shell, without the kernel, and brings it to the question,
 what

what remedies they may, in virtue of this trust, pursue in this court.

These trusts are equally declared to make entries and bring actions, as the case shall require. Here it is expressly to do all and every such lawful act and acts by entry, or otherwise, as shall be requisite for that purpose and end.

But whether the expression be the one or the other, it comes to the same thing, and comprehends all remedies both in law and equity. For the course of equity is a part of the constitution of the law and judicial proceedings in this kingdom.

Therefore, if after a forfeiture committed, and an entry made for that forfeiture, such trustees wanted any assistance of a court of equity in support of their trust, and not to break in upon the right of the tenant for life, to receive the rents and profits, they might undoubtedly, by force of this trust, have their remedy here.

As they may do this, I am clearly of opinion, that they may bring a bill for an injunction to stay waste, although no precedent in point is produced for it.

In the present case, they were remainder-men *pur autre vie*, and immediate owners of the freehold in law. In the case of *Dayrell against Champneys*, 1 *Ab. of Cases in Equity*, 400. a remainder-man for life was admitted to

to maintain such a bill, without making the owner of the inheritance a party; and although it was observed upon that case by Mr. *Clark*, that it appears by the state of it in the book, that the plaintiff had the first remainder in tail vested, yet that doth not appear by the recitals of this decretal order; and if it had, the objection could not have been made.

If the trustees could do this as remainder-men of the legal estate *pur autre vie*, surely their trust, which affects their conscience, and, according to Lord *Raymond*'s opinion, makes them creatures of this court, would not make their case the weaker here.

But the books go further, and say, a bill may be brought for an injunction to stay waste, on behalf of an infant *en ventre sa mere*. And so is *Musgrave* against *Parry*, 2 *Vern.* 710. which is liable to much more difficulty; for that must be as *amicus curiæ*, on the unborn child's behalf.

I therefore hold most clearly, that the trustees might have brought such a bill, and obtained an injunction to stay this waste, both against the plaintiff's father, and the late Sir *John Hind Cotton*.

Pursue this then into its necessary consequences.

Suppose, after such an injunction granted, the timber had been felled. This had been a contempt of the court, and the contemnor must have stood committed:

Then

Then arises the question which Mr. Solicitor General* very properly put in his argument:—On what terms should they be discharged? This court could not have fined them; therefore, certainly, only on the terms of making satisfaction. That satisfaction could not have been by setting up the trees again, and therefore it must have been by paying the value. Who must have had that value? Not the tenant for years, for he had no pretence to it; nor the remote remainder-man in fee, for he had no right to take it: and this would have been to reward them both for their contempt and collusion. The consequence is, it must have been laid up and secured to attend the contingent uses: without this, justice could not have been done.

Fourthly, It comes next to be considered, how far and in what cases such trustees may be charged in equity with a breach of trust, or any other person may be affected by their act, or laches, in breach of trust.

Notwithstanding the saying of Mr. *Pollexfen*, *arguendo* at the bar, (*Poll.* 250.) “that trustees to preserve
“contingent remainders were never punished in equity
“when they broke their trust,” (which, by the way, is a kind of contradiction in terms), that is now exploded, and settled to the satisfaction of mankind to be otherwise.

It was first broken in upon by Lord *Harcourt*, in the case of *Pye and Gorges*, *Mich.* 1710, where he declared,

Prec. Ch.
308.
1 P. Wms.
128.
2 Salk. 680.

* Afterwards Lord *Mansfield* C. J.

that “ when such trustees were appointed, whether by
 “ marriage settlement or will, and they, before the
 “ birth of a son, joined in a conveyance to destroy the
 “ contingent remainders, this was a plain breach of
 “ trust, and the persons taking under such a convey-
 “ ance, if voluntary, or having notice, should be liable
 “ to the same trusts ;” and he said, if there was no
 precedent in the case, he would make one.

1 Eq. Caf.
 Abr. 385.
 Gilb. Eq.
 Rep. 34.

Then came *Tipping* against *Pigot* in *Mich.* 1711, before the same Lord Chancellor, and he adhered to the same doctrine, and said, it would be dangerous for such trustees themselves to make the experiment. Thus it stood, till the great case of *Mansell* against *Mansell*, which was first decreed by Sir *Joseph Jekyll*, at the Rolls, in *January* 1731, and afterwards by Lord *King*, assisted by Lord *Raymond*, and Lord Chief Baron *Reynolds*, 12th *December* 1732.

1 P. Wms.
 678.
 2 Eq. Ca.
 Abr. 747.

Here it was first solemnly settled, by the concurrent opinion of all those great men, that the trustees themselves shall be liable, in equity, to make satisfaction for such a breach of trust, and also, that a voluntary alienee, or a purchaser for a valuable consideration, with notice of the trust, shall be decreed in equity to restore the estate ; and, in that case, it was decreed accordingly.

Thus it stands determined, that for a breach of trust in aliening the inheritance, the trustees are liable, and other persons are affected by their act done in breach of this trust,

On this I build. Suppose these trustees had consented to the felling and sale of the timber ; had joined with Mr. *Garth* and Sir *John Hind Cotton* in the articles, and expressly covenanted, that they would bring no bill for an injunction ; would the trustees, in that case, have been liable ? Clearly so ; for it was agreeing to alien part of the inheritance ; and it plainly follows from the principle on which the court founded itself in *Mansell* against *Mansell* : Lord *Raymond* said, “ It was strange, in natural reason, to say, that where
“ a man hath created a trust to preserve his estate, the
“ trustees may break that trust, and give away the
“ estate with impunity ; and that there wanted no particular precedent for it, because it is founded on all
“ the general rules of trust.”

If the trustees had joined in the articles thus to break their trust, would Mr. *Garth* the father, or the late Sir *John Hind Cotton*, have been affected by this express act, done in breach of their trust ? This, to me, is also as clear ; for then they would have had notice of this breach of trust, and have reaped the benefits of it, which is expressly within the rule of *Mansell* against *Mansell*. And here I cannot help repeating some remarkable words of Lord *King*, who was not disposed to amplify the jurisdiction of this court. “ If it is,” said his Lordship, “ a breach of trust, and the trustees
“ convey the estate over, a court of equity is not to
“ sit still and let others profit by the spoil.”

This position is very apposite to the present case ; all the difference is, that here is no positive act of the trustees,

tees, but only a *laches*, or neglect in not performing their trust, and bringing a bill for an injunction to stop this waste.

This may excuse the trustees, if they had no notice of the scheme, or attempt to strip the estate of the timber; but how will it excuse the others, who, as Lord *King* expressed it, have profited by the spoil? By no means.

In all cases of alienations, the alienees are not affected merely by the act of the trustees, but by notice of the trust; and here all parties had actual notice of the will, claim under it, and have expressly recited it in their articles: therefore, in this case, the actual notice of the trust operates to make the laches of the trustees affect them, as much as their express act would have done in the other; and it would be strange to say, that the plaintiff's and defendant's father would have been liable for the timber, if the trustees had concurred in the destruction and sale of it; but shall be in a better condition, because they did not. What is the justice that results from hence, but restitution? Just as in the case of an alienation with notice, the justice would have been a reconveyance. Indeed, it plainly follows by analogy, from thence.

Suppose an estate, with valuable mines in it unopened, settled in this manner, and the trustees to preserve contingent remainders had joined in an alienation with notice: afterwards, such a purchaser with notice opens the mines, and exhausts them, putting a great sum of

money into his pocket : then a son is born, who is tenant in tail : the tenant for life dies, and the son brings a bill for a reconveyance ; if, according to the authority of *Mansell* against *Mansell*, the court had decreed a reconveyance, would the justice have been complete, without decreeing satisfaction for so much of the inheritance as was carried off, by exhausting the mines ? Clearly not. It would be a necessary unavoidable consequence of equity, that satisfaction must be made to the owner of the inheritance. And yet this is liable to the same objections as have been made in the present case at the bar. It was done at a time when the contingent remainder-man had neither *jus in re* nor *jus ad rem*, before he was in *rerum natura* ; and no wrong can be done to a person non-existent. But these are colourable objections only : for, if equity ought to wait, and expect the vesting of the estate for his benefit, and restore him that estate, it ought to do it completely.

I have chosen to go through the general reasoning, (which hath, upon the maturest consideration, convinced me, that the plaintiff ought to be relieved in this court), before I state the objections made on the part of the defendant, the rather, because the clearest answer to these objections will arise from the right application of that reasoning.

First objection.—That the interposition and allowance of trustees to preserve contingent remainders, was not intended, nor has been suffered, to alter the legal rights of the tenants for life, and the first remainder-

man of the inheritance vested, either in respect of the timber, or other property of, or powers over, the estate.

Answer.—This objection assumes too much ; for I have already proved, and it is demonstrable, that the very intention of interposing this new invented limitation, was to alter and abridge the legal rights, both of the tenant for life and the first remainder-man vested ; to abridge the legal right of the former to defeat and destroy the contingent use of the inheritance, whilst it remains contingent and eventual ; to abridge the legal right of the latter to destroy it, by accepting a surrender of the estate for life ; all which are as much legal powers, as the cutting down of timber, or the opening or digging of mines.

I admit the instance which was put, that if (where there is tenant for life, or for years, subject to waste) timber is blown down by accident, or cut down by the tort of a stranger, or of the tenant for life alone, the owner of the first remainder of inheritance vested, shall have the benefit of it ; so was the case of the timber blown down on the late Duke of *Newcastle's* estate, and the case of *Whitfield* against *Bewit*, 2 *P. Wms.* 240 : but the ascertaining of the ground of these resolutions, is sufficient to distinguish them from the present case.

The common law doth not, nor can consider contingent uses, as having existence till they happen ; therefore, according to *Lewis Bowles's* case,

11 Co.

11 Co. 79. and *Udall* against *Udall*, *Alleyn* 81. an estate in contingency is as no estate, till the contingency happens. And when the trees are severed, the property must vest immediately in somebody, and that can only be in the first remainder-man of inheritance vested; and, on the foundation of that property, he may maintain trover for them.

This is his right at law; and there is, in the cases put of trees fallen by accident, or merely by the wrongful act of a stranger, or of the tenant for life, no ground of equity to take it from him.

But here comes in the force and operation of the collusion in this case. This destruction being made by contrivance and collusion with the remainder-man, and affecting his conscience; obliges this court to pursue its known maxims, in laying hold of it, either by restraining the act before it be completed, or decreeing satisfaction for it afterwards. For in all cases where a legal right is acquired, or exercised by fraud or collusion, contrary to conscience, it is the office of this court to enjoin it, or decree a compensation.

Second objection.—That the relief sought by the bill, is contrary to all the rules of law, which allows no remedy for waste to any person, who hath not an immediate reversion or remainder of inheritance vested at the time of the waste committed.

Answer.—This is true in general, though it admits of some exceptions, even at common law. But if it

were true at commonlaw, in the latitude with which it was laid down, it would not govern this case, which depends upon principles of equity, arising from the collusion and covin between the tenant for years and the remote remainder-man; which is an established ground of relief in this court, even beyond, and sometimes contrary to, the rules of law.

However, as I always incline to adhere, as near as justice will admit, to the rule *equitas sequitur legem*, I will endeavour to shew how far the opinion I have given, coincides with, and is supported by, the reason of some cases concerning waste.

It is clear, that when there is tenant for life with remainder for life, remainder over in fee or tail, and tenant for life commits waste, the remainder-man in fee, or in tail, can have no action of waste. The reason is, because the plaintiff in the action must recover the place wasted, and that would be an injustice to the remainder for life, which is not forfeited; and if it should be recovered by the owner of the inheritance, (being under a limitation of the party), it would never go back again.

But, notwithstanding that, he may have another action of trover for the trees, and therein recover satisfaction for the wrong done to the inheritance; nay, in case the remainder-man for life dies, leaving the remainder-man of the inheritance, he may then bring an action of waste for the waste done during the continuance of the remainder for life.

Further,

Further, if there be tenant for life, with an immediate remainder or reversion in fee, and the remainderman, or reversioner in fee, grants over his remainder or reversion to *A.* for the life of *A.*, then the tenant for life commits waste, and afterwards the grantor of the remainder or reversion for life dies, this remainderman or reversioner in fee may maintain an action of waste, though he had parted with his remainder or reversion for that time by his own voluntary act.

All this appears by *Paget's case*, 5 Co. 76 b. and the case of *Udall v Udall*; and I shall make a further use of it by and by.

But such is the abhorrence of the common law to waste and destruction, that it hath extended its remedies, in some special cases, beyond the strict principles on which they were originally founded; and, therefore, though it be requisite, in general, that the inheritance should be vested in the plaintiff at the time of the waste done, else he cannot lay it to his disherison, yet, if the estate were out of him by wrong, and then came into him again, he shall maintain the action of waste. Thus, if lessee for life make a feoffment in fee upon condition, the feoffee does waste, and afterwards breaks the condition, and the lessee for life enters for the breach, though the reversioner had nothing in the reversion at the time of the waste done, yet, as it was out of him by tort, when it is re-vested, he shall have this remedy. *Co. Lit.* 356 a.

But there is another case at law, the reason of which seems to me to be more analogous to the present case: as that of a bishop, after the restitution of temporalities to him and his successors in right of his church. When he dies, during the vacancy, the right is in the king; and when a new bishop is invested in the temporalities, the fee is in him. Suppose, then, a tenant for life or for years, by demise of the predecessor, commits waste during the vacancy, the successor shall have the action for this waste, though he had nothing at all in the land at the time the waste was done. *Co. Lit. 356. Fitzherbert's N. Br. 112.*

I shall be told, perhaps, that that is by particular statute, and, therefore, is no proof of the reason of the common law, and that the statute of *Marlb. ch. 29.* against depredations upon the possessions of ecclesiastical persons, gave this remedy; and, for this, some countenance may be drawn from what *Fitzherbert* says in the place cited.

But I beg leave to deny this to be law, and to hold, that that statute doth not include bishops, or their possessions; and of this opinion is Lord Coke, in his reading on the statute of *Marlb. 2 Inst. 151.* His words are; “ This act extendeth only to abbots, priors, and
 “ other prelates that be religious and regular, and not
 “ to bishops and other ecclesiastical persons being secular; for in the second clause of this act *hujusmodi*
 “ *religiosorum* is mentioned, for the distinction between
 “ religious and secular; and the reason of this diversity
 “ sity

“ fity is, that the abbots and priors, and other religi-
 “ ous persons, are dead persons in law, and have ca-
 “ pacity to have lands and goods only for the use and
 “ benefit of the house, and cannot make any testa-
 “ ment; and, therefore, the church or religious house
 “ is holden always one, in respect whereof the suc-
 “ ceeding abbot shall have an assize for disseisin done
 “ in the life-time of his predecessor, and an action of
 “ waste for waste done in his predecessor’s time; but
 “ so shall not a bishop, dean, archdeacon, or the like,
 “ who are ecclesiastical persons secular; because the
 “ church, by their death, hath an alteration, and is
 “ not always one.”

That the opinion of Lord *Coke* was, that the action is not founded on the statute of *Marlb.* is clear by other cases; for if bishops were within the statute, then they, as well as abbots, might have an action of waste, for waste done, not in time of vacancy, but in their predecessor’s time, which, as to ecclesiastical persons regular, is clearly within the statute; but it hath been settled, that they cannot, 39 *Edw.* 3. 15. 2 *Henry* 4. 2. 2 *Roll’s Abr.* 8. 24 *Pla.* 3, 4, 5, 6, 7. From hence I infer, that this remedy was given not by particular statute, but by the policy of the law, which would not permit an estate which it allowed to be created, and whilst it was in *gremio legis*, as it were, to be destroyed or stripped, without giving a remedy to punish it, though by an extension of its common principles.

But

But still I must resort back to this, that if there was not so much countenance from the reason of some cases at the common law for this opinion, yet that would not govern this case, which depends on principles of equity; and equity hath always gone further to restrain waste and destruction, than the common law hath done.

Therefore, in the case already put, of an intermediate remainder for life, though the law allows no action of waste, this court sustains a bill for an injunction; and this *ab antiquo*, according to the case in *Moore*, 554. where Lord *Ellesmere* says, he had seen a precedent for it so long ago as in the reign of *Rich. 2.*, 1 *Roll's Abr.* 377. 1 *Vern.* 23. and many cases in practice.

And although the tenant in tail, after possibility of issue extinct, is at law punishable for waste, by reason of the inheritance, which was once in him, yet Lord Chancellor *Nottingham* was clearly of opinion, to grant an injunction to restrain a tenant in tail from committing waste in timber which grew for the ornament of a mansion-house, *Abraham v. Bubb*, 2 *Vern.* 53. and 2 *Shower* 69. In the same book, there is the like case before Sir *John Trevor*, M. R., 2 *Freeman* 278. and this hath been followed since by several cases of tenant for life without impeachment of waste generally, who have attempted to pull down a mansion-house, or to cut down timber growing for shelter, or ornament of the mansion-house.

But

But this court hath gone still further; and, in the case of *Abraham v. Bubb*, Lord Nottingham cites the case of a Lady Evelyn, where there was tenant for life, remainder to the first son for life, without impeachment of waste, with remainders over, and the first son, by leave of the lessee of the tenant for life, came upon the land, and felled timber, which was not under the description of trees growing for shelter or ornament; and this court granted an injunction against him, though no action whatsoever could be maintained at law: and, upon the same ground, I did the like in the case of *Fleming* against the late bishop of *Carlisle*, and others. There the bishop was tenant for life, remainder to his eldest son for life, without impeachment of waste, with remainder over in fee. The eldest son, by permission of the bishop, entered, and began to cut down the timber; and the reversioner in fee brought a bill for an injunction, and I granted it, because he was not to be allowed to exercise his power of doing waste by anticipation, and before the estate to which this privilege was annexed came into possession. And this in reason comes near to the case of the late Sir John Hind Cotton's bringing himself by collusion, into possession of the timber before his time.

The case of *Robinson* against *Lytton* went still further than the common law: that cause was heard in this court the 12th of *December* 1744; there was a devise to the defendant and his heirs, and if he should die before his age of 41 years, leaving no issue, then to the testator's first, &c. daughters in tail, remainder to the testator's own right heirs; but if the defendant should live

3 Atk. 209.
2 Eq. Ca.
Abr. 528.

live to attain the age of 21 years, then the estate should be sold, and the money to be applied for the benefit of the testator's daughters. The defendant, being under the age of 21 years, began to commit waste, and the daughters brought their bill in this case; and though the defendant had the inheritance in him in point of law at the time, yet, by reason of the contingent executory limitation, the court granted an injunction; and at the hearing of the cause, after its being fully argued, made that injunction perpetual.

Third objection.—That suppose a bill might have been maintained by the trustees to support the contingent remainders to stay this waste before it was committed, yet it will not follow from thence that after that is over, a bill may now be brought for an account; and that the jurisdiction of this court to decree an account of the value of the timber, is only incident and concomitant to the jurisdiction of granting an injunction.

Answer.—It is true, that the general run of the cases is of bills for an injunction, because that is a preventive suit, and the most remedial to the party; but that affords no conclusive argument that a bill for such an account cannot be maintained, without praying an injunction.

3 Atk. 262.

In support of this notion, only one case was cited, *Jesus College against Bloome*, which was before me November 13, 1745. The lessee of the college had, during his lease, cut down some trees, and taken away some

some stones and materials off the premises, and converted them to his own use. The term was expired, and a new lease granted to a stranger. The college brought their bill for an account and satisfaction of the waste. At the hearing of the cause, I doubted (amongst other things) whether such a bill in equity was maintainable, without praying an injunction to stay the waste; and it stood over to another day, to produce precedents. None were produced; and the bill was dismissed without costs: but the point was not absolutely determined, nor was that the only ground of the dismissal; but I was opinion, that at the utmost it was in the discretion of the court; and if the college had a right, they might clearly bring an action of trover at common law; and it being a matter of small value, I did not think fit to countenance such bills in this court, after the lease expired.

This is widely different from the present case, in all its circumstances, and particularly that it is admitted that the plaintiff here, though greatly damnified, can have no remedy at law, which is a substantial difference.

Fourth objection.—But it was objected further, that if such a bill for an account, not incident to an injunction, can be maintained, yet there is no precedent of decreeing the value of the timber to be secured, and laid out in land, for the benefit of the contingent remainder-man; and this could not be done even upon a bill by trustees to preserve contingent remainders
before

before the waste completed ; and for this the case of *Whitfield* against *Bewick* was relied on.

Answer.—This objection hath been already answered in the course of my argument, and to that I will refer without repeating it. The sound distinction between this case and that of *Whitfield* and *Bewick* is the collusion and covin between the tenant for years and the remote remainder-man in fee ; whereas, in that case, the remote remainder-man in fee was entirely innocent, and had done nothing contrary to conscience to come at his legal property in the timber when severed ; but it was solely the tortious act of the tenant for life ; and I think I have proved, that in some cases of destruction of contingent remainders, or alienations of part of the inheritance to the prejudice of the contingent remainder-man, such an account and compensation must be decreed in order to obtain adequate justice.

On this I rely for an answer to that objection.

Fifth objection.—That the demand is made after a great length of time, and that ought to be allowed as a bar in this court.

Answer.—But though there is length of time in the case, no statute of limitations stands in the way, nor is there any laches to be imputed to the plaintiff.

It is true the articles were entered into in 1714, and the timber was felled soon after ; but the plaintiff was
not

not born till *May* 1724: his father lived till 1727, and he did not attain his age of 21 years till *May* 1745; and this bill was brought in *May* 1748, within three years after his coming of age.

As to the inconvenience objected to arise from this length of time, how is that inconvenience greater than the common law's allowing an action of waste to be brought by a remainder-man in fee, after the death of a mesne remainder-man for life, for waste done in his life-time? That life may have lasted forty, fifty, or sixty years afterwards; and yet this the law allows. Besides, in this case, the plaintiff submits to accept the value on the foot of the defendant's answer, which avoids the difficulty of an account.

Sixth objection.—Another objection hath occurred to me in considering this case, which was not mentioned at the bar; and that is, that by suffering a recovery in 1745, the plaintiff hath altered the state of the remainder which was in him by the will, and gained a new use. That this might have been a bar to a proper action of waste at law, for waste done precedent; and by parity of reason ought to take away his remedy in this court.

Answer.—This objection, though it may strike at first, yet receives a clear answer.

I admit, that in *Co. Lit.* 53 *b.* Lord *Coke* lays it down that after waste done, there is a special regard to be had to the continuance of the reversion in the same state

state that it was at the time of the waste done ; for if after the waste done, the reversioner granteth it over, though he taketh back the whole estate, yet is the waste dispunishable. So, if *A.* grant the reversion to the use of himself and his wife, and of his heirs, yet the waste is dispunishable, and so of the like ; because the estate of the reversion continueth not, but is altered, and consequently the action of waste for waste done before, which consists in privity, is gone.

This is undoubtedly law : but the difference is, here is no use or new estate created. The use of this recovery is declared only to the plaintiff himself and his heirs, whereby his estate tail is turned into an estate in fee, which in Lord *Derwentwater's* case, before the Judges and Delegates, *Hil. 6 Geo. 1.* was solemnly determined to be the same use, and the same fee, only delivered from the fetters and restraint laid upon it by the statute *de donis* ; and this was agreeable to the resolution of the case of *Abbot* against *Burton*, 2 *Salk.* 590. *Trin. 7 Ann. C. B.* and to the case of *Martin ex dem. Tregonwell* against *Strahan*, adjudged in *B. R. Hil. 16 Geo. 2.* and affirmed in the House of Lords in *February 1743.*

11 Mod. 181.
Com. Rep.
160.

But I go further still, and hold, that even in cases where the state of the reversion would be so altered by the act of the reversioner as to preclude his proper action of waste, yet still his property in the timber severed before would remain, and he might maintain trover for it, which is sufficient to take off the force of this objection as applied to the present case.

Seventh

Seventh objection.—I shall mention but one objection more, and that arises recently from the present state of the cause, as it comes before the court upon a bill of revivor against the representative of Sir *John Hind Cotton*, the original defendant: That an action of waste dies with the person; and if the plaintiff had in other respects been in a condition to maintain waste against Sir *John Hind Cotton*, the party to the articles, it had been gone by his death. That the law is the same as to the action of trover: *pari ratione* he hath lost his equitable remedy for the waste.

Answer.—I admit the law to be clear, that an action of waste dies with the person; and I also admit that I cannot find any authority or precedent for maintaining an action of trover against an executor upon a conversion by the testator in his life-time. Though as to this point I give no opinion: for thus much is certain, that an action of trover will lie for an executor upon a conversion by the defendant, in the life-time of the plaintiff's testator, for which there are many authorities; and it seems difficult to be reconciled to reason and justice, that these remedies should not be mutual even at the common law.

However, I will admit, for argument's sake, that the action of trover for the timber was, as well as the strict action of waste would have been, gone at the common law; but notwithstanding that, I am of opinion, that the plaintiff is entitled to the same relief in this court.

There have been several determinations in this court, where, by force of the rule *actio personalis moritur cum persona*, the remedy at law hath been extinguished, yet equity hath given the like satisfaction.

It is well known that at common law, before the statute of 30 Car. 2. c. 7. and 4 & 5 Wm. and Mary, c. 24. s. 12. no action or remedy could be had against the executor of an executor for a *devastavit* committed by the first executor of the goods of the original testator. But notwithstanding this, equity did not scruple to get the better of this artificial maxim, and decreed an account and satisfaction against the representatives of such a wasting executor, out of his assets.

This is laid down as a rule in equity by Lord Chancellor Nottingham, in the case of *Price* against *Morgan*, 2 Ch. Cas. fol. 215.

His words are, “ Although, by the common law, “ when the executor wastes, his executor shall not be “ liable, because it is a personal wrong, it is otherwise “ here, and the common law will come to it at last ; “ and, therefore, whatever estate of the wasting executor is come to his representative, which his testator “ wasted, the personal estate of such wasting executor, “ in the hands of his executor, shall answer.”

When Lord Nottingham said the common law would come to it at last, he was a true prophet ; for this
case

case was decided in the 28th of *Car.* 2. and the law was altered by act of parliament in the 30th of *Car.* 2.

1 *Ch. Cas.* 121. *Eton College* against *Beauchamp* and *Biggs*.—The provost and fellows of *Eton* were possessed of a rent or pension of 1 *l.* 14 *s.* *per annum*, granted by King *Hen.* 6. to that college, issuing out of the lands. The defendant *Biggs* was executor of the tenant; and the bill was brought for a satisfaction of the arrears of rent incurred in his testator's life-time, and suggested that the college did not know the lands out of which the rents were issuable, and so could not distrain; and though the person of the terre-tenant was not chargeable with the rent at law, but only the land by way of distress; yet, forasmuch as the testatrix held the land, and did not pay the rent, it was said that thereby the testatrix's personal estate was augmented; and therefore the Master of the Rolls, Sir *Harbottle Grimstone*, decreed the executor to pay the arrears, as far as he had assets of the testatrix.

And 1 Eq.
Ca. Ab. 31.

In 2 *Mod.* 293. Anon. error, *Hil.* 29 *Car.* 2. in the Exchequer Chamber, before the Lord Chancellor and Lord Treasurer, assisted by the two Chief Justices:—The case was, the plaintiff had declared against the defendant, as executor of *Edward Nichols*, who was executor of the debtor. The defendant pleaded that the said debtor died intestate, and administration of his goods was granted to a stranger, *absque hoc*, that *Edward Nichols* was ever executor, but did not say by his plea, or ever administered as executor, for, in truth, he

was executor *de son sort*. The plaintiff replied, that before the administration granted to the stranger, *Edward Nichols* possessed himself of divers goods of the debtor, and made the defendant executor, and died. And to this replication the defendant demurred. Judgment was given for the plaintiff in the Court of Exchequer, but reversed in the Exchequer Chamber ; for an executor of an executor *de son tort* is not liable at law, though the Lord Chancellor *Nottingham* said he would help the plaintiff in equity.

These authorities would be sufficient to establish the point I am now upon : but I go further, and hold, that in all cases of fraud, the remedy doth not die with the person ; but the same relief shall be had against an executor out of the assets of his testator, as ought to have been given against the testator himself. For as equity disclaims the maxim, that a personal remedy dies with the person ; wherever the demand is proper for that jurisdiction, this court will follow the estate of the party liable to that demand, and out of that decree satisfaction. Now, collusion between two persons, to the prejudice and loss of a third, is, in the eye of the court, the same as a fraud ; and you have observed that one principal ground of the judgment of the court in this case is, collusion appearing upon the face of the articles set forth in the answer.

I have now gone through the arguments and objections arising upon the particular case, and the authorities of law and equity.

One general argument remains, of which the counsel on both sides did in their turns endeavour to avail themselves : I mean the argument *ab inconvenienti*, which undoubtedly is of weight, especially in a new case.

On the side of the defendants were urged, the inconveniencies that would arise from making such a precedent, which would tend to lock up the timber of the kingdom from coming to market; would create questions between possessors of estates and contingent remaindermen springing up at a great length of time, and there would be no knowing where to stop.

But let these inconveniencies be compared with the inconveniencies that follow on the other hand, from laying it down that a contingent remainder-man cannot possibly have any remedy in such a case ; I say, let them be compared, and the former will weigh nothing in the opposite scale against the latter.

Thus far the law allows settlements of estates to go, and no further ; and it hath been found to be a convenient medium between perpetuities, and too flux and unstable a condition of things. Most of the family estates in this kingdom are under such settlements, and it frequently happens, that the first remainder-man of the inheritance vested is a remote relation ; remote in blood ; and remote in the prospect of succession, perhaps after fifty years contingent limitation of that inheritance.

If what has been done in this case should be determined to have been done *impune*, without any possible recompence in a court of equity, what havock would it make, and what a licence would be proclaimed! Every remainder-man in fee, though after ever so many contingent limitations, might, by collusion with the tenant for life or years in possession, or perhaps of his under tenant, strip the estate, and convert the value of it to their own use. Suppose an estate in the great timber counties of *England*, in the North, or in *Cornwall*, where the principal value may consist in timber, or mines, all that value may be exhausted and dissipated before a first son is born: he may find nothing but the shell of what was intended for the lasting support of a family of honor.

It will be no answer to this to say, the trustees to preserve contingent remainders may bring a bill for an injunction to stop this mischief; the mischief may be completely executed before they know it, nay, possibly before they can know whether they are trustees or not: for it most frequently happens, that trustees to preserve contingent uses, are inserted in settlements and wills without their being made acquainted with it.

From hence it is evident, that this will be but a shadow of a remedy, unless the court goes further, and builds a more adequate relief upon the same principles.

And

And here I cannot help adding, that this becomes of the greater importance from the practice, and abuses of the times, into which we are fallen; when so many new inventions and contrivances daily shew themselves in courts of justice, to supply, or to tempt, or to impose upon the extravagance and necessities of tenants for life, to the destruction of their families.

These considerations bring to my mind the last reasoning of the Judges in *Fermor's case*, 3 Co. 79. and with that I will conclude.

That resolution was quite new, and of the first impression, and was contrary to the letter of the statute of the 4th of *Hen. 7. c. 24.* but the book says, “ Lastly, “ the Judges, in this resolution, did greatly respect the “ general mischief, which would ensue, if such fines, “ levied by practice and covin of persons who had particular interests, should bar those who had the inheritance.”

The result of the whole is, I must decree satisfaction to the plaintiff for what the late Sir *John Hind Cotton* received out of his assets; and if the original limitations had been still subsisting, I must have directed this money to have been laid out in lands, to the same uses; but as these are now barred, and the plaintiff is tenant in fee, the money is his own.

In this the question of interest is material, and I have considered it. The principal money is reckoned by the answer at 1000 l.; the cause being heard on bill and

answer, and the plaintiff having at the bar prayed interest from the time it was received in respect of the possible growth of timber.

But there being no proof, it does not appear what was the condition of the timber ; whether by the time the plaintiff's father died in 1727, it might not have been decayed, and of little value ; what might have been exhausted in repairs, or destroyed by tempests or accidents ; or what young timber may have grown up in its place in the mean time. From these considerations, and as this is a new case, I do not think fit to give interest further back than the filing of the bill.

TITLE XVI.

REMAINDER.

CHAP. VIII,

Of other Matters relating to Remainders,

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| <p>§ 1. <i>Where contingent Remainders are limited, the Inheritance remains in the Grantor.</i></p> <p>11. <i>How far this Doctrine is applicable to common Law Conveyances.</i></p> | <p>13. <i>Contingent Remainders are transmissible.</i></p> <p>15. <i>And also contingent Uses.</i></p> <p>17. <i>Exception.</i></p> <p>19. <i>A contingent Remainder may pass by Estoppel.</i></p> <p>21. <i>May be assigned in Equity.</i></p> <p>22. <i>And devised by Will.</i></p> |
|--|--|

Section 1,

WHERE a remainder of inheritance is limited in contingency, by way of use, or by devise, the inheritance, in the meantime, if not otherwise disposed of, remains in the grantor and his heirs, or in the heirs of the testator, until the contingency happens, to take it out of them,

Where contingent Remainders are limited, the Inheritance is in the Grantor.

§ 2. Thus, in *Sir Edward Clere's* case, it was resolved by *Popham* Chief Justice, and *Baron Clarke*, upon conference had with the other Justices, that “ if
 “ a man, seised of lands in fee, makes a feoffment to
 “ the use of such person and persons, and of such estate
 “ and estates as he shall appoint by his will, that, by
 “ operation of law, the use doth vest in the feoffor,
 “ and

6 Rep. 184.

“ and he is seised of a qualified fee, that is to say, till
 “ declaration and limitation be made according to his
 “ power ;” and, “ when a man makes a feoffment to
 “ the use of his last will, he has the use in the mean-
 “ time.”

Leonard
 Lovic's case,
 10 Rep. 78.

§ 3. Where a feoffment was made to the use of the feoffor for his life, and, afterwards, to the use of such tenants as he should demise any part of the premises to, for life, or years, &c. and afterwards to the use of the performance of his will, and to the use of such person and persons to whom he should devise any estate in the premises, and after performance of his will, to the use of several persons successively in tail, and, ultimately, to the use of himself and his heirs for ever ; it was held, that nothing vested till the death of the feoffor, because he had power, by his will, to devise to any person, even in fee-simple ; from which it followed, that, in the meantime, the use of the fee vested in the feoffor, as it was adjudged in *Clere's case*.

Carth. R.
 262.

§ 4. In the case of *Davis v. Speed*, Lord Holt put this case. If a feoffment in fee is made to the use of A. and the heirs of his body begotten, the remainder in fee to the right heirs of T. S., who is then living, that in such case, the fee-simple is not in abeyance, nor in the feoffee ; but the use of the fee shall result to the feoffor, and remain in him until the contingency, viz. the death of T. S. shall happen.

Ch. 6. f. 23.

§ 5. So, in the case of *Plunkett v. Holmes*, it was said by *Wyndham* and *Twisden*, and agreed by the other

other Judges, that the fee descended to *T.* as heir, till the contingency happened; though not so as to confound his estate for life, and was not in abeyance: that, in relation to *L.*, *T.* took only an estate for life; but, in the meantime, by operation of law, he had the fee in such sort, as that there should be an *hiatus*, to let in the contingency when it happened.

§ 6. So in the case of *Purefoy v. Rogers*, although *Saunders* urged, that the contingent remainder to the son was not destroyed, for that, at the time of the fine, the heir of the testator had no reversion or estate in him; because an estate for life was devised to the wife, and the remainder in fee was devised to her son, upon a contingency; so that, until it could be known whether such contingency would happen or not, the reversion must be in abeyance, and not in the heir; and then his conveyance gave no estate to the husband and wife, but they were only tenants for life of the wife, as before. But Lord *Hale* interrupted him, and said, it was clear that the reversion was in the heir of the testator by descent, and not in abeyance; and, accordingly, it was adjudged, that the contingent remainder was destroyed. Ch. 6. f. 14.

§ 7. So in the case of *Carter v. Barnadiston*, which has been already stated under another name, a question arose, whether the fee was in abeyance, or did descend to the testator's heir at law. Loddington v. Kyme, Ch. 1. f.

The Master of the Rolls considered the fee as in abeyance. He strongly argued against the notion of the 1 P. Wms. 511.

the fee's descending (in that case at least) to the heir at law of the testator, till the contingency happened; yet admitted, that where one devises lands to *A.* for life, remainder to the right heirs of *J. S.* then living, though the remainder in fee is in abeyance, yet there is a possibility left in the heir; and that this was plain, even in the case of a grant: and that this possibility seemed such an interest, as entitled the donor to enter for the forfeiture made by tenant for life, for that his estate was as much determined as it would have been by his death; and that it was absurd that a tenant for life by an unlawful act, *viz.* by his destroying the contingent remainder, should gain to himself an indefeasible fee-simple; that it was like the possibility that was upon a grant at common law to a man and the heirs of his body, for there, though the grantor had no reversion, yet he might enter when the grantee died without issue,

But, upon an appeal to Lord Chancellor *Parker*, the decree of the Master of the Rolls was reversed; and his Lordship's argument, as to this point, is thus reported by *Peere Williams*.

“ As to the remainder in fee being in abeyance, or
 “ in the custody of the law, or (as some call it) *in*
 “ *gremio legis*, his Lordship much exposed that notion;
 “ saying, the most reasonable inference from it was,
 “ that it should be for the preservation of this remain-
 “ der; but since the construing the fee to be in abey-
 “ ance, would, on the contrary, tend to the manifest
 “ destruction thereof, and, since nothing but neces-
 “ sity

“ sity in any case, should occasion the fee-simple to be
 “ in abeyance, since the diversity taken by the books
 “ was between a will and a common law conveyance,
 “ and that in case of a will, where the remainder was
 “ devised in contingency, it was held, that the rever-
 “ sion in fee descended to the heir at law, in the
 “ meantime; and that whatsoever estate was not dis-
 “ posed of by the testator, descended to the heir: his
 “ Lordship said he should abide by that opinion, and
 “ was very clear in it.

“ That it was a strange construction to take pains
 “ by a strain in law, to place a remainder in law *in nu-*
 “ *bibus*, or in abeyance, on purpose that the testator’s
 “ intention should be wholly frustrated, and that the
 “ tenant for life might be under a temptation to dis-
 “ appoint the will, by destroying the contingent re-
 “ mainder, by a recovery or feoffment, which, in this
 “ case, must be admitted to be tortious conveyances:
 “ nay, what was still more extraordinary, that the
 “ tenant for life must be rewarded for this wrong, and
 “ that he, who before had but an estate for life, should
 “ gain an absolute and indefeasible fee-simple; and
 “ this by doing a wrongful act, which would be to
 “ take advantage of his own wrong, both against law
 “ and reason.

“ That the case of *Plunkett v. Holmes* was a resolu-
 “ tion in point, that where the remainder in fee was
 “ devised in contingency, the fee descended to the
 “ heir until the contingency happened. And though
 “ he should admit that resolution to be extrajudicial,
 “ and

Ante, ch. 6.
 f. 23.

Ante.

“ and not directly to the point then in question, yet
 “ the opinion of four learned Judges must be of great
 “ weight, especially against the notion which was con-
 “ tended for by the other side : and that the case of
 “ *Purefoy v. Rogers* in 2 *Saunders*, was equally in
 “ point ; and the interruption which Lord *Hale* gave
 “ to *Saunders*, who attempted to argue this, did not
 “ proceed from any heat or impatience in Lord *Hale*,
 “ (who was master of a great deal of temper, as well
 “ as learning), but from the result of his fixed judg-
 “ ment and opinion, that where, after an estate for
 “ life, the remainder in fee was devised upon a con-
 “ tingency, the fee-simple not being disposed of until
 “ the contingency happened, must, in the meantime,
 “ descend to the heir. And to say that, in these cases.
 “ of *Plunkett v. Holmes*, and *Purefoy v. Rogers*, the
 “ devise over of the fee (after the contingent devise in
 “ fee) was to the testator’s right heirs, and that this
 “ distinguished it from the principal case, and made
 “ the heir take by descent, was hardly agreeable to
 “ the rules of law ; for when the testator had devised
 “ the remainder in fee upon so remote a contingency,
 “ having in that manner given a fee, he could go no
 “ farther, nor devise any remainder over ; and, there-
 “ fore, in such case, the devise over of the fee-simple
 “ would be void, whether made to the heir or to any
 “ other person.

“ That these devises to the issue male of *Evers*
 “ *Armin* in fee, if there should be any issue male, or
 “ if there should be none, then that *Willoughby* should
 “ go to *Barnadiston* in fee, and *Pickworth* to *Styles* in
 “ fee,

“ fee, being made upon contingencies that never hap-
 “ pened, it was the same thing as if those devises had
 “ never been made ; and, consequently, the reversion.
 “ in fee descended to the testator’s heir at law.”

§ 8. Notwithstanding the authority of the preced-
 ing cases, the doctrine of the fee-simple being in abey-
 ance, was held by Lord Chancellor *Talbot* in the fol-
 lowing case.

§ 9. *A.* devised lands to *B.* and *C.*, and the survi-
 vor of them, and the heirs of such survivor, in trust
 to sell ; the estate was decreed to be sold, and it being
 referred to the Master to see, whether the parties could
 make a good title, the Master reported, that the par-
 ties could not make a good title, there being no fee-
 simple in the trustees, for that the remainder in fee
 could only be vested in the survivor, and it was uncer-
 tain which of the two trustees would be the survivor.
 Exceptions being taken to the Master’s report, the
 Lord Chancellor held, that the trustees joining in a
 fine of the premises would pass a good title to the
 purchaser by estoppel ; that here the fee was in abey-
 ance. And it being said by the counsel, that the heir
 of the devisor would join in the conveyance to the
 purchaser, his Lordship replied, that the heir’s joining
 would supply the want of proving the will, but that,
 in every other respect, it would be void.

Vick v.
 Edwards,
 3 P. Wms.
 372.

§ 10. Mr. *Fearne* observes, that the opinion, in this
 case, does not appear to have been the subject of suffi-
 cient consideration, to be relied on as an authority
 against

525.

against the doctrine relative to the descent of the inheritance to the testator's heir, which appears to have been so directly and fully established by the several cases above stated : and, to dispute the descent of the inheritance to the heir at law of the testator, in the case of a contingent remainder created by will, would be sacrificing the authority of a series of cases wherein that point has been solemnly decided and repeatedly recognized, after the maturest discussion, to the occasional opinion of Lord *Talbot* in *Vick v. Edwards*, where that point was not debated, nor the direct subject of decision.

How far this
Doctrine is
applicable to
common Law
Conveyances.
Fearne, 526.

§ 11. The preceding observations on the doctrine of the continuance of the inheritance in the grantor and his heirs, is confined to cases of conveyances by way of use, and dispositions by will ; for different opinions have prevailed in respect to its admission in conveyances at common law.

Some have held, that in case of a lease for life, remainder to the right heirs of J. S. then living, no estate at all remains in the grantor, and that he cannot enter for the forfeiture in case of a feoffment of the tenant for life ; whilst others, though disinclined to admit that any estate remains in the grantor in such case, still allow him a right of entry for the forfeiture, upon a feoffment by the tenant for life ; no less than on the determination of his estate by death, before the contingency happens. These opinions are founded on an assumption, that the remainder must pass out of the donor at the time of the livery, and, consequently, that

1 Inst. 342 b.
1 P. Wms.
515.

that no estate shall remain in him after such livery: and, therefore, in the case of a lease to one for life, remainder to the right heirs of J. S., the remainder is in abeyance, or *in nubibus*, or *in gremio legis*. Though, (says Mr. *Fearne*), by way of some sort of compromise between common sense and the supposition of an estate passing out of a man, when there is no person *in rerum natura*, no object besides hard, and hardly intelligible words for the reception of it, at the time of the livery: they are compelled to admit such a species of interest to remain in the grantor, as, upon the determination of the estate, before the contingent remainder can take place, entitles the grantor or his heirs to enter and re-assume the estate.

§ 12. In 2 *Roll's Ab.* 418. it is laid down, that if a lease for life or in tail be, the remainder to the right heirs of J. S., and tenant for life dies without issue, living J. S., the remainder is void; because J. S. cannot have an heir during his life: and inasmuch as this does not take effect during the particular estate, it shall never take effect, though he dies after, and has an heir. And in such case, inasmuch as the remainder cannot take effect, the donor shall have the land again. What is this in effect, (says Mr. *Fearne*), but admitting that no more actually passed out of the grantor than the estate to the tenant for life or in tail, until and unless J. S. died before the estate of such tenant determined.

Vin. Ab. Tit.
Remainder,
(I.)

Vide Cont.
Rem. § 18.

§ 13. A contingent remainder of inheritance is transmissible to the heirs of the person to whom it is limited,

Contingent
Remainders
are transmissi-
ble.

limited, if such person chance to die before the contingency happens.

Weale v.
Lower,
Pollez. 54.

§ 14. *Richard Lower* made a feoffment to the use of himself for life, and after the death of himself and *Philadelphia* his wife, to the use of *Thomas* his eldest son for life, and after the death of *Richard, P.*, and *Thomas*, to the use of *Jane* the wife of *Thomas*, and of such issue male or female as the said *Thomas* should beget on her; and if *Thomas* should have no issue by her, then to the use of *Jane* for life; and after the death of *Richard, P.*, and *Jane*, all the lands to the use of *Thomas* and the heirs male of his body, remainder to the right heirs of *Thomas*.

Thomas had issue a daughter, and then made a lease of all the lands by deed indented for 500 years, and afterwards granted the lands by fine to the lessee for 500 years, and died in the life-time of *Richard*.

It was held, that the estate limited to *Thomas* was a contingent remainder; for the particular estate was only for the life of *Richard*, whereas *Thomas's* estate was not to commence till after the death of *Richard* and *P.* his wife; and though *Thomas* levied the fine for 500 years, and died before the contingency happened, yet his heir afterwards, when the contingency did happen, was bound by the fine, and the lease for 500 years took place; for it was agreed that the contingent remainder descended to his heir.

§ 15. The

§ 15. The same law, it seems, holds with respect to contingent uses, which will also descend to the heir.

And also
Contingent
Uses.

§ 16. Thus, it is laid down in *Shelley's case*, that if a man, seised of the manor of S., covenants with another, that when J. S. shall enfeof him of the manor of D., then he will stand seised of the manor of S. to the use of the covenantee and his heirs: the covenantee dies, his heir within age, J. S. enfeoffs the covenantor. In this case it was holden, that the heir shall be adjudged in, in course and nature of a descent; and yet it was neither a right, title, use, nor action that descended, but only a possibility of an use, which could neither be released nor discharged; yet it might, if the condition had been performed, have vested in the ancestor, and then the heir had claimed it by descent.

1 Rep. 99 a.
Wood's case.

Wilson v.
Bayley,
3 Bro. Parl.
Ca. 195.

§ 17. Mr. *Fearne* observes, that some cases may arise, where the existence of the devisee of a contingent remainder, at some particular time, may, by implication, enter and make part of the contingency itself, upon which such interest is intended to take effect, in which case it cannot descend.

Exception.
Cont. Rem.
534.

§ 18. Thus, in a modern case, where a husband and wife settled certain lands (which were the inheritance of the wife) to the use of the wife for life, remainder to the husband for life, if he and his wife should have any issue that should so long live, remainder to all such children in fee as tenants in common. If the wife should die without issue, or all such issue

Moorhouse v.
Wainhouse,
1 Black. R.
638.

should die before 21, then, as to one moiety, to the husband in fee. The husband died in the life-time of his wife.

The court was clearly of opinion, that upon all the circumstances of the case, the contingency, upon which it was intended that the estate of the husband should arise, was that of his surviving his wife; and that as he died first, the contingency never arose.

A contingent
Remainder
may pass by
Estoppel.

§ 19. A contingent remainder may, before it vests, be passed by fine by way of estoppel, so as to bind the interest which shall afterwards accrue by the contingency.

Ante, f.

§ 20. Thus, in the case of *Weale v. Lower*, it was determined, that though the fine operated at first by conclusion, and passed no interest, yet the estoppel should bind the heir. That upon the happening of the contingency, the estate by estoppel became an estate in interest, of the same effect as if the contingency had happened before the fine was levied; and that if the fine had been in fee, it would have barred the heir, and operated to the benefit of the possession, as the fine of a disseisee to a stranger; but being only for years, the fee was vested, and the term good, being drawn out of the fee.

Vick v.
Edwards,
Ante.

May be as-
signed in
Equity.

Tit. 36.

§ 21. Although a contingent remainder cannot be passed or transferred by a conveyance at law, before the contingency happens, otherwise than by estoppel, by fine, or by a common recovery, wherein the person entitled

to

to the contingent estate comes in as vouchee; yet it seems that contingent estates are assignable in equity.

§ 22. Contingent remainders were formerly held not to be devisable by the persons entitled thereto, whilst they remained in contingency; but it has been determined in some modern cases, that where contingent remainders are descendible to the heirs of the persons entitled to them, they may be devised by will like any other estates: of which an account will be given under Title 38. *Devise.*

And devised
by Will.

TITLE XVII.

R E V E R S I O N.

§ 1. *Description of.*10. *A Reversion arises from Construction of Law.*12. *Reversions are vested Interests.*15. *Incidents to a Reversion.*17. *Reversions after Estates for Years are present Assets.*20. *Reversions after Estates for Life are quasi Assets.*23. *Reversions after Estates Tail are Assets, when they come into Possession.*31. *Reversions after Estates Tail are bound by Judgements.*33. *And also by Leases.*36. *All particular Estates merge in the Reversion.*

Section. 1.

Description
of.

1 Inst. 142 b.

THE second kind of estate in expectancy is called a *Reversion*, and is defined by Lord Coke to be, the returning of the land to the grantor or his heirs, after the grant is determined. *Reversio terræ est tamquam terra revertens in possessione donatori, sive hæredibus suis, post donum finitum.*

1 Inst 23 b.
Plow. 151.

In another place, Lord Coke defines a reversion to be, where the residue of the estate always continues in him who made the particular estate.

§ 2. The idea of a reversion is founded on the principle, that where a person has not departed with his whole estate and interest in a piece of land, all that which he has not given away remains in him; and the possession of it reverts or returns to him, upon the determination of the preceding estates. Hence Lord Coke says,

1 Inst. 183 b.

says, “and the law termeth a reversion to be expectant
“upon the particular estate; because the donor, or
“lessor, or their heirs, after every determination of any
“particular estate, doth expect or look for to enjoy
“the lands or tenements again.”

§ 3. If, therefore, a person, who is seised in fee, conveys an estate for life to *A.*, remainder for life to *B.*, remainder over to twenty other persons for life, he still retains the fee-simple of the lands in himself, because he has not departed with it; but as such fee-simple can only return or fall into possession upon the determination of the preceding estates, it is only an estate in reversion.

§ 4. Before the statute *de donis conditionalibus*, no reversion remained in the grantor or donor after he had created a conditional fee; because the grantee of such an estate was considered as having the absolute property of it, and the grantor had only a possibility of reverter. But, as soon as the statute *de donis* was made, the Judges determined that an estate given to a man and the heirs of his body, was only a particular estate; and, therefore, that there remained an estate in reversion in the grantor. Tit. 2. ch. 1.
f. 9, 10.

1 Inst. 22 b.

§ 5. But in the case of a grant of a qualified or base fee, no reversion remains in the grantor; for, Lord *Coke* says, if lands be given to *A.* and his heirs, so long as *B.* hath heirs of his body, the remainder over in fee is void. 1 Inst. 18 a.

Rep. 269.

Vaughan, observing upon this passage, seems to doubt whether it be law, and says—“ When such a base fee
 “ determines for want of issue of the body of *B.*, the
 “ land returns to the grantor and his heirs, as a kind
 “ of reversion ; and if there can be a reversion of such
 “ estate, I know not why a remainder may not be
 “ granted of it,”

1 Inst. 46 b.

§ 6. Lord *Coke* says, that if a person, seised of land in fee, leases it for years, he has no reversion ; nor can he grant it over by the name of a reversion, till the lessee enters, or the lessor waives the possession. But where an estate for years is created by a bargain and sale, the bargainor has immediately a reversion, whether the bargainee enters or not ; for, in this case, the possession is transferred by the operation of the statute of uses.

Vide Tit. 8.
 ch. 1. § 14.
Lutwich v.
Milton,
Tit. 32.

§ 7. Where a person, having only a particular estate in lands, grants a smaller estate than his own, he has a reversion left in himself. Thus, if tenant in tail grants an estate for life, he has a reversion in him ; because he has not departed with the whole of his interest.

§ 8. In the same manner, where a person, who has an estate for 99 years, grants an estate for 98 years, or for any shorter term, he has a reversion left in him.

1 Inst. 22 b.

§ 9. Lord *Coke* says, that if a man extends lands by force of a statute merchant, statute staple, recognizance, or *elegit*, he leaves a reversion in the cognizor.

§ 10. A reversion

§ 10. A reversion is never created by deed or writing, but arises from construction of law. Thus, Lord *Coke* says, if a man make a gift in tail, or a lease for life, the remainder to his own right heirs, the remainder is void, and he has the reversion in him. So, if a man makes a feoffment in fee to the use of himself for life, and after to the use of another in tail, and after to the use of his own right heirs, the reversion in fee is in him; because the use of the fee continued ever in him: and the statute executes the possession to the use, in the same plight, quality, and degree, as the use was limited.

A Reversion
arises from
Construction
of Law.

1 Inst. 22 b.

Tit. 16. c. 1.
f. 29.

§ 11. Lord *Coke* also says, that if a man makes a feoffment in fee, to the use of himself in tail, and after to the use of the feoffee in fee, the feoffee has no reversion, but in the nature of a remainder; albeit, the feoffor have the estate tail executed in him by the statute, and the feoffee is in by the common law, which (says he) is worthy of observation.

1 Inst. 22 b.

§ 12. Although a person can only be said to be entitled to, not seised of, a reversion, yet estates in reversion are properly classed under the general denomination of vested interests. Because a person, entitled to an estate in reversion, has an immediate fixed right of future enjoyment, that is, an estate vested *in presenti*, though it is only to take effect in possession and profit *in futuro*; and which may be aliened and charged much in the same manner as an estate in possession.

Reversions
are vested
Interests.

§ 13. The

§ 13. The law is as careful of the rights of the reversioner, as of those of the tenant in possession, and will therefore allow an action to be brought by the reversioner, as well as by the tenant in possession, for an injury done to the inheritance.

Jeffer v.
Gifford,
4 Burr. 2141.

§ 14. A person in reversion brought an action for erecting a wall, whereby his lights were obstructed, and obtained a verdict with general damages: on a motion in arrest of judgment, it was objected, that this action would not lie by a reversioner, being only an injury to the person in possession. The court were of opinion, that an action might be brought by one, in respect of his possession, and, by the other, in respect of his inheritance, for the injury done to the value of it. For, if the reversioner wanted to sell the reversion, this obstruction would certainly lessen the value of it.

Incidents to
a Reversion.

§ 15. The usual incidents to a reversion are said to be fealty and rent: when no rent is reserved on the particular estate, fealty results of course, and may be demanded as a badge of tenure.

1 Inst. 143 a.
151 b.

§ 16. Lord *Coke* says, that, in the case of a gift in tail, lease for life or years, fealty is an incident inseparably annexed to the reversion; so that the donor or lessor cannot grant the reversion over, and save to himself the fealty, or such like service. But the rent he may except, because the rent, although it be incident to the reversion, yet is not inseparably incident.

§ 17. A rever-

§ 17. A reversion, expectant on the determination of a term of years, is present assents; and the heir cannot plead a term of years raised by his ancestor in delay of execution, but should confess assents.

Reversions
after Estates
for Years
are present
Assents.

§ 18. In an action of debt against the heir upon the obligation of his ancestor, the defendant, not denying the action or obligation, pleaded, that his ancestor was seised in fee; and that he demised the same for 500 years to A., who entered; and that the said reversion descended, *et riens ultra*; and that, at the time of the action brought, he had no tenements in fee-simple by descent, except the said reversion. It was not questioned, but judgment ought to be given for the plaintiff; the doubt was, whether general or special.

Smith v.
Angel,
1 Salk. 354.
2 Ld. Raym.
783.
7 Mod. 40.
Osbaldeston v.
Stanhope,
2 Mod. 5c.

The court were of opinion, that a general judgment ought to be given. And Lord *Holt* said, it had been a doubt, whether the heir could plead a term for years in delay of present execution; and, though there were even some precedents to that purpose, yet he was of opinion, the heir could not plead a term in delay, but ought to confess assents: for the reversion is assents, and the common law had no regard to a term for years, 2 *Inst.* 321. And there is no mischief in this: for though, in consequence, a *levari facias* may go, yet the lessee may maintain himself against an ejectment, by virtue of his lease.

§ 19. In a subsequent case, the Court of Common Pleas acquiesced in the doctrine laid down by Lord *Holt*, but gave judgment upon another point.

Villers v.
Handley,
2 Will. R. 49.

§ 20. A rever-

Reversions
after Estates
for Life are
quasi Assets.
Carth. 129.

§ 20. A reversion, expectant on the determination of an estate for life, is *quasi* assets, and ought to be pleaded specially by the heir; and, in such case, the plaintiff may take judgment of it, *quando acciderit*.

Dyer, 373 b.
pl. 14.

§ 21. In debt against the niece, as cousin and heir to the uncle, the obligor; the defendant confessed the bond by *nient dedire*, but that nothing in fee-simple descended to her beside a reversion of 30 acres of marsh in S., &c. after the death of such a one. It was held, that the plaintiff might pray a special judgment upon the confession, *viz.* that he should recover the debt and damages of the aforeaid reversion, to be levied when it should fall in; and a special writ should issue to extend the whole 30 acres.

Rook v.
Clealand,
1 Ld. Raym.
53.
Lutw. 503.

§ 22. A man, seised of a reversion expectant upon an estate for life, bound himself and his heirs in a bond and died, leaving the tenant for life: it was held, that this reversion should be assets in the hands of the heir, whenever it came into possession.

Reversions
after Estates
Tail are
Assets when
they come
into Posses-
sion.

1 Roll. Ab.
369.

§ 23. A reversion, expectant on the determination of an estate-tail, is said not to be assets, during the continuance of the estate tail. But this is only, because, during that time, it is considered to be of no value, as it is in the power of the tenant in tail to bar and destroy it whenever he pleases, by suffering a common recovery. But, when reversions of this kind fall into possession, they then become assets.

§ 24. In

§ 24. In a special verdict, it was found, that *John Rowden*, the father of *Richard* (the defendant), was seised in fee of a messuage, &c. and, being so seised, had issue *John Rowden*, his eldest son, and the defendant: that *John* the elder settled the premises on himself for life, remainder to *John* his eldest son in tail male, remainder to his own right heirs. After the death of the father, *John* his eldest son entered, and was seised in tail, and also entitled to the reversion in fee, and died leaving an only son, who soon after died without issue; whereupon, the lands descended to the defendant as heir to his nephew, who entered, and was seised in fee. The question was, whether he was liable to the payment of a bond debt of his father's. The counsel on both sides agreed, that the reversion, having come into possession by the determination of the estate tail, was chargeable with the debt, and the only doubt was, whether the plaintiff ought to have named the intermediate heirs to the reversion. Three of the Judges observed, that the question was not, whether the defendant was liable to the debt, but whether he was properly charged as heir to his father, or whether he should have been charged as heir to his nephew, who was last seised. And it must be admitted, that if the lands had descended to the brother and nephew of the defendant in fee, then they ought to have been named; but they had only a reversion in fee, expectant upon an estate tail, which was uncertain, and therefore of little value. But here the reversion in fee was come into possession, and the defendant had the land as heir to his father: it was assets only in him, and was not so either in his brother or nephew, who were neither of them

Kellow v. Rowden,
3 Mod. 253.

them chargeable ; because a reversion, expectant upon an estate tail, was not assets.

§ 25. A reversion, expectant on an estate tail when it comes into possession, is assets for payment of debts, though it should be devised away : for such a devise is, by the statute 3 *William and Mary*, ch. 14., fraudulent and void against creditors.

Tit. 1. l. 64.

Kynaston v. Clarke,
Forrest. MS.
Rep. S. C.
3 Atk. 204.

§ 26. A settlement was made in 1707 of lands, to the use of *Thomas Delahaye* for life, remainder to trustees to preserve contingent remainders, remainder to the first and every other son of *Thomas Delahaye* in tail male, reversion to his own right heirs. *Thomas* being indebted by bond to several persons, and, among others, to one *Blacket*, gave him a collateral security of some stock, which was transferred for that purpose, and agreed to be re-transferred upon payment of principal and interest ; and, being likewise indebted by simple contract, died in 1724, leaving issue one son *Thomas*. In 1725, there was a decree obtained, by which the father's estate was directed to be sold for the payment of his debts, and the simple contract creditors to stand in the place of the bond creditors ; and, under this decree, some fee-simple lands were sold and applied. In 1738, *Thomas* the son devised the settled estate to the defendant, and died without issue ; whereby the estate tail was spent, and the reversion in fee came into possession.

The plaintiffs brought their bill to have this estate applied towards satisfaction of their debts, notwithstanding

standing the devise of it by the son. And now the question was, whether this reversion in fee was to be considered as real assets of the father, applicable to the payment of his debts; or, if it was prevented from being so by the devise of the son?

Mr. Attorney General argued for the plaintiffs, that, if there had been no devise by the son, the reversion had certainly been assets: for, though it could not, during the continuance of the estate tail, be extended or sold for payment of debts, yet, when it descended, it was assets, and the heir is named in the obligation, which is all the law requires to subject it to the payment of bonds, as appears from *Kellow v. Rowden*, Ante, f. 24. 3 Mod. 253.: and, from *Osbaston v. Stanhope*, 2 Mod. 50. it is plain that the only thing which distinguishes such an estate from any other, is, that it is not immediately chargeable to satisfy debts; but that, where it descends and comes to the heir by succession, it clearly may. I shall, therefore, consider this case under these three heads: 1st, Upon the construction of 3 and 4 William and Mary, c. 14. against fraudulent devises, which gives an action against the heir and devisee; 2dly, That bonds are such liens in equity, either before or since that statute, as cannot by any contrivance be defeated; and, 3dly, That the decree in 1725 has bound this estate in equity, precedent to the devise, in such a manner, that no subsequent act can affect the estate.

1st, With respect to the act against fraudulent devises, both the reason and the words of it extend to the present

present case. The preamble is, “Whereas it is not reasonable or just, that, by the practice or contrivance of any debtors, their creditors should be defrauded of their just debts, and, nevertheless, it has often happened, that where several persons, having by bonds or other specialties bound themselves and their heirs, have afterwards died seised in fee-simple of and in manors, &c. and have devised the same, or disposed thereof in such manner, as such creditors have lost their said debts; all wills, therefore, or testaments, of or concerning any manors, &c. whereof any person at the time of his decease is seised in fee-simple in possession, reversion, or remainder, &c. shall be deemed and taken (only as against such creditor or creditors as aforesaid) to be fraudulent and void.” And, sect. 5., “in all cases, where any heir at law shall be liable to pay the debt of his ancestor, in regard of any lands, &c. descending to him, and shall sell, alien, or make over the same before any action brought, such heir at law shall be answerable for such debt, &c. in an action of debt to the value of the lands,” &c.

The mischief, which this statute had in view, was a defect in the common law; that, although it was the intent of the law that an heir, in respect of the land descended, should be bound, yet it was left in the power of the obligor, by a devise, absolutely to defeat his creditors. This was the general mischief, and is plainly within the reason of the act, and the thing it intended to prevent: for, it is as unjust that the heir should be able to defeat the creditor, as that the ancestor should, and, consequently, as much justice to prevent

prevent it in him, as in the other. The statute says *all wills shall be void as against the creditor*; cautiously wording it so as to take in every case, where a creditor may be defeated of his debt, and where he would have obtained satisfaction, had no such will been made. It may be objected, that the will mentioned in the statute, is not the will of the heir, but of the ancestor. I answer, the act relates to all wills, and is not confined to that of the debtor; but, if it was, the heir is *debtor* in a proper sense for this purpose. The making of all wills void, as against creditors, is attended with no inconvenience: it gives the creditor no new right, but only removes that out of his way which unjustly obstructed him. It avoids the will only as to the creditor; and, certainly, where the will of the heir prevents the creditor from that, which would otherwise, in point of law, have been applied for his satisfaction, such will is in fraud of the creditor. It may be said, that the preamble extends only to the will of the obligor, and that the enacting clauses must be restrained by the preamble; but the rule made to maintain the objection is not true: for it is well known, that general statutes are made from particular cases; every day's experience proves it; and, indeed, it is manifestly so in this act itself. For the preamble mentions only wills; but one of the clauses in the statute relates to conveyances made by the heir, which is less reconcileable to the preamble than wills made by him: and, though it be said, *for remedy of which*, it is added, *and for the maintenance of just and upright dealing*, which is as much as to say, *and of all other the like cases*; and, to avoid all doubts of this kind, the words *such creditors* are repeated, to

show the provision was not to be restrained to one case only. Can it be conceived, that an act to prevent fraudulent devises, should particularly provide against conveyances by the heir, and forget a devise made by him? But the legislature know, that the first part of the act gave remedy against that, as it did against all wills. Here I may observe, 13 *Eliz.* c. 5. against fraudulent conveyances; since it is a maxim, that statutes, made *in pari materia*, are to be taken into the construction of each other, as Lord *Hale* said in *Baily v. Murin*, 1 *Vent.* 246. such acts are explanatory of each other; and, agreeable to this, was the case of *Hodson v. Wallis*, considered upon the division of intestates estates. So, in *Read v. Ward*, 12th December 1739, where the question was, whether *Knox Ward* was a purchaser saved by the act against bankrupts, 21 *Jac.* 1. c. 19. it was objected, that though there were five years between the act of bankruptcy and the commission, yet he had notice of the act of bankruptcy; and, though 21 *Jac.* makes no mention of notice, yet it was thought proper to consider that act by the other of 13 *Eliz.* c. 7. by the last clause whereof, it is enacted, that the act shall not extend to lands heretofore assured by any such bankrupt, or hereafter to be assured; so that such assurance be made *bonâ fide*, and that the parties, to whose use such assurance hath or shall be made, be not, at or before the making of such assurance, privy or consenting to the fraudulent purpose. Now, the 13 *Eliz.* makes all deeds void, which operate to the prejudice of creditors, whether made by the immediate debtor or not, according to *Apbary v. Bedingham*, *Cro. Eliz.* 359. where a conveyance, made
by

by the heir of the obligor, was held fraudulent against a creditor. So, in 5 Co. 60. the same question upon 13 Eliz. and the conveyance by the heir held fraudulent; and that acts of parliament made in prevention of fraud, ought to have a favourable interpretation. These cases went upon the doctrine, that the statute relates to all conveyances, which defraud the creditor of that estate that must otherwise have come to him by law, and prove that the act comprehends the alienation of the heir. It is objected, that the statute is confined to the *debtor*; but, here, it is a general question, whether the act against fraudulent devises extend to the devise of the heir: now the heir is debtor; he is bound in the bond; and, in an action against him, he may be charged without charging assets: it is his business to discharge himself for want of assets, for he is *debtor* with respect to the lands descended. The action must be in the *debet* and *detinet*; and, before the statute of jeofails, it was error to lay it in the *detinet* only. As, therefore, he is, in law, debtor, he is within the purview of the act; and, in *Turner's case*, 3 Co. 18. it is determined, that all statutes against fraud shall be liberally and beneficially expounded to suppress the fraud. If it is said, that this holds true, where the reversion is expectant upon an estate for life, but not where an estate tail intervenes, some pretence must be shown for this distinction. The act says, *reversions or remainders*, which, if relating to the first, must also take in the second, the second mischief being certainly the same in both.

2dly, The next question is, whether, supposing there was no remedy at law in this case, equity would suffer creditors to be defeated by the devise of the heir? It is a general rule, that a trustee cannot defeat a charge upon the estate by any voluntary act; but the charge will follow the estate in the hands of the volunteer, and it makes no difference whether the conveyance be made in his life-time by will, or dying without heir: for, if the taker is a volunteer, the estate will be charged. There is a plain instance of this in the lien, which the wife has in this court, upon any interest of her's not reduced into the husband's possession, to be provided out of it. *Sed per* Lord Chancellor, it is certain that, if an obligor, before the statute, devised his lands, equity could not come at them, nor relieve his creditors; that is settled. I have seen many cases of Lord *Nottingham's*, where it was so determined; and Lord Chief Baron *Comyns* said, he had heard Lord Chief Justice *Holt* declare, that equity could not aid in such a case. The wife, in the case I put, has such a lien, as will prevail even against a commission of bankruptcy; which is a strong and favourable consideration for creditors. I think it is since the statute, that equity has made the strong cases in favour of bond-creditors, and considered the heir as strongly bound. The law gives the estate to the creditor only *quousque debitum solutum*; but this court will decree a sale, order interest to be paid, and make the heir accountable for the profits received by him; because, since the statute, equity considers the heir as a trustee, and there is no other principle for such decrees. The law makes an heir pay costs

costs in an action by a creditor upon a bond ; but this court gives him his costs, if he has done nothing wrong, and this upon the same principle. Equity will also direct the sale of a reversion after an estate for life ; because the estate is applicable as a trust estate. I do not know that there is any instance of the court's doing these things before the statute, but they have been done since by the equity of the act. In many cases, this court goes farther than the law. The law only gives an action against an executor for a *devastavit* ; and, if the executor is insolvent, the creditor is defeated : but this court goes farther. So, if a money legacy is paid, equity will oblige the legatee to refund. The law says, a reversion after an estate tail is assets, as much as after an estate for life ; only, it is not so soon effectual. Where it is after a life, the heir cannot plead *riens per descent*, and the creditor will have a judgment against him ; but, after an estate tail, he may plead *riens per descent*, yet the creditor may take judgment *quando acciderint*, and have execution when the reversion comes into possession. The only difference, therefore, is in regard to the time, when the creditor can obtain the fruit of his action ; but that makes none in the things, nor in equity, which respects the substance, and not little variations in the form of pleading, or times of execution : in both, the bond is real lien, though not immediately effectual against one interest. So, if a right encumbered, or a rent-seck descend, the heir may plead *riens per descent*, and the creditor may have judgment *quando acciderint*, and take execution after ; yet the law says, that neither the right, before it be reduced into possession, nor the rent-seck before seisin had, are assets,

Brediman's case, 6 Co. 58. Equity considers all contingent interests as real ones, though subject to a contingency, and will not let the person who has it carry it away. Suppose a contingent remainder, and, in the life of the obligor, the contingency not happened, it is not assets; but, when the contingency does happen, it will be applied to pay debts in equity, which shows that the court considers bonds as real liens upon the estate, and will not, in any case, allow the creditor to be defrauded.

3dly, The third point is the decree of 18th June 1725, which has bound the estate. It directs the estate of the intestate father to be sold, and the money, arising from the sale, to be applied for payment of his debts. The Master, therefore, might have sold this estate under the decree; and, if he might, then the decree binds it from the time it was pronounced. Suppose a naked right, or a contingent remainder had descended, yet it would have been bound, though at law it is not assets; but it is bound to be applied *in futura*. The meaning of *binding* by a decree is, an order that the thing shall be done: it is not material whether presently or at a future time. The only question, then, can be, whether a man shall defeat the intention of the court; and it is evident from *Sir Thomas Harvey v. Montague*, 1 Vern. 57. 122. that the court will not suffer it, nor countenance any art to elude the force of its decrees,

Mr. *Murray* argued for the defendant, that the construction of 3 and 4 Wm. and M. must be the same in this court as at law; the intent of construing a statute being only to discover the meaning of parliament in making

making it, and that must be uniform and certain: for, if one court puts a different construction upon it from the other, one of them must necessarily be in an error. Indeed, one court may give a different, more extensive, or more effectual remedy, than the other, as this court generally does; but, still the meaning of the legislature must be the same in all courts, where its acts are considered. I shall consider, first, how the matter in dispute stood, both at law and in equity, before the statute.

At that time, neither in law nor equity were lands devised, liable to pay bond debts: there is no part of the law more certain, than what relates to bonds, and the effects of them. If the heir was not named in the bond, it was only a personal contract: if he was named, all the effect of it was, that the lands descended to him should be liable; but still, in point of law, bonds were never considered as liens upon the obligor's lands; and, therefore, several other securities were introduced by acts of parliament, which should become real liens, as statutes merchant, staple, recognizances, &c. But bonds were left as they stood before, and no action upon them could be brought against a terre-tenant of the obligor, but against his heir. There were devisees before the statute of wills; but no action on a bond could be maintained against a devisee of lands by custom, merely because they were considered at law as alienees. The law was the same with respect to the devisees of the obligor before 3 and 4 *Wm. and M.*, and none of the statutes against fraudulent deeds relate to devisees, either in law or equity;

for the devise took not effect till death; and, from the time of *H. 8.* to this statute, though many wills must have defeated creditors, yet there is no instance of their obtaining relief. This is proved by the greatest authority: for this very act of parliament says, that, by that means, the debts were lost. Since this act, all the cases have gone upon it as introducing a new law, as laying down a new rule, and the determinations have been founded upon it; 1 *Wm.* 99. A bill brought upon this act against the devisee of the obligor in a bond, the defendant insisted the heir should have been a party; saying, that the action shall be brought against the heir and the devisee jointly. Lord *Cowper's* words are; “ It is the act, makes this
 “ assets in the devisee's hands; and that, requiring the
 “ heir to be made a defendant, you must follow the
 “ remedy therein prescribed; and this bill, in equity,
 “ is as an action at law:” which shows that these proceedings against devisees are considered in this court as strictly founded upon the statute, which must be strictly pursued; and, independent of this law, equity could not interpose. Indeed, the reason of the thing speaks it: for this court has only a concurrent jurisdiction with courts of law in legal assets to give relief; but, in the same rule of property, for to follow another rule, would be to make law. It is a maxim of law, that lands are not liable to simple contract debts, and copyholds to no debts. It may, perhaps, be hard to account for all these rules: they are founded upon reasons which have long since ceased; yet equity, finding those rules established, cannot assist against them. Before 29 *Car. 2. c. 3.* an heir, taking a life estate

as occupant, was not thereby subject to his ancestor's debts; nor did equity ever make him so: and, in all cases, where the law says that lands are legal assets, this court does not depart from the rule of property laid down at law, but proceeds in a more extensive manner, and gives a more effectual remedy. Suppose the case of a reversion after an estate for life or in tail, the law says the first is assets, and that the heir cannot plead *riens per descent*; or, if he did, that judgment would be given against him: whereas, in this court, the estate might be decreed to be sold, which is only coming at the thing sooner. But the other, in law, is not assets, because the heir may do what he will with it; he may sell or give it away, and the creditor's being able to take judgment, *quando acciderint*, proves nothing; for he may take such judgment, though there be nothing descended to the heir at all. This court, then, will not say, such an interest is assets, because that would be to make law. Cases may be put, where such a reversion is a good and certain estate, as where it is after a limitation to the first and other sons of a woman of 60: yet it will not be assets. In order to avoid the confusion of two rules of property, this court adopts the rule of law: so it does with respect to the civil law in cases of legacies; and, indeed, if different rules were allowed in different courts, it would be in the election of the party, what measure of justice, what sort of determination, he would take. The present will is made by one who is neither a debtor nor a trustee, for his estate was never liable: it was never assets in his hands; nay, it never was subject to pay debts in the hands of the obligor. How, then, can it
be

be a fraud to dispose of what was never liable, even in the obligor's hands? There is no doubt but the heir might have incumbered this estate, given it to whom he pleased, barred it by a common recovery. *Cui bono*, then, is this court to interpose? Only to put the parties hereafter to the expence of a recovery to enable them to devise it; and so, no fair or upright dealing will the statute produce, but with regard to the fees of *C. B.*

This brings it, therefore, to the construction of the act; and that must be uniform in law and equity. It sets out with a maxim, deduced from natural justice, that *creditors should not be defrauded*: are there any defrauded here? And, granting that this statute was made to supply a defect in 13 *Eliz.* and carry the provision to devisees; admitting, likewise, the rule of construction of acts *in pari materia*; yet will it not affect this case: for it is not within 13 *Eliz.* If he had been seised of this reversion in fee, and made a grant of it, the grantee, and not the creditors, would have had the benefit of it by that statute. The enacting clause in 3 and 4 *W. and M.*, which has been mentioned as relating to conveyances by the heir, has a preamble, independent of that to the former part of the statute; and though a clause may in some cases go farther than the preamble, yet certainly it cannot, when it refers to the preamble, as it does here; saying, *such creditors*, that is, such as are mentioned in the preamble, to whom a man has bound himself and devises, not where a third party devises. In constructions, *verba relata in esse videntur*: repeat the words here, and the clause will not reach this case. There is a remedy given by the act:

an action may be brought against the heir at law of the obligor *and such* devisee. That again refers to the preamble: how can the devisee be charged, but in an action as devisee of the obligor? He may plead *riens per devise*, if the heir could plead *riens per descent* from the devisor. *Hæres dicitur ab hæreditate*; it is not from being *son*: for, if nothing came to him by descent, he is not heir. Had the reversion been after a life, the heir must plead it specially; because the law says, such an interest is *quasi* affets: but, in the present case, he may plead *riens per descent*; because, in law, he has nothing. Indeed, if the reversion had descended, he might have been liable; but the reason of that is, because, in pleading, he must have made himself heir to the obligor; but it is otherwise, if not connected with the debtor: as where the ancestor has a son and a daughter by one venter, and a son by a second, and dies; the eldest son enters and dies before any action brought, and makes *possessio fratris*, &c. the daughter would have the lands, but she could not be charged, not being *very* heir; nor could the second son, as not having affets. Here, if the devisor had issue, and the estate tail had continued, yet he might have devised this reversion, and it would have been good: but if, after a long course of descents, the estate tail was spent, and the reversion had gone through twenty purchasers, the creditors might, after 500 years, re-call this reversion to pay their debts, though the devises were good during all that time; and this for no other end but to make persons suffer recoveries, as if an omission of a legal formality created a new head of equity.

It

It has been objected, that the defendants were precluded by the decree, when the question was not made in the case, was not heard by the court, nor the estate then before it. But, indeed, all that is begging the question: for, if this interest was part of the father's estate, then it was to be sold by the decree; but not if it was the son's estate, for that the court could not bind. The father had lands, which were sold by this decree; but, when it was made, the court could not order a sale of the reversion, for the son might have barred it after the decree.

Mr. Attorney General.—If it was true that the only business of this court is to give a farther remedy than the law does, but strictly tied up to the rules of law, many rules of equity must be laid aside, since they cannot be accounted for. How is it, that when there are two obligors, and one dies, though there is no way at law to subject the lands of him who died, this court does assist? So the profits of an estate, descended to the heir, cannot be reached at law; yet here they will. The true reason is, that there is a general ground in law which warrants it, that the estate descended is the creditor's, and liable to pay his debts: and, in all cases, wherever the law lays down a general principle, or creates a general lien, this court will carry it on where the law will not. Now, suppose the obligor himself had devised this reversion, would it not then have been liable to his debts? Certainly it must, and would fall within the obvious sense of the statute. And why shall it do so now? since the law does not regard the time when it is to be applied in payment. It is true, the
law

law says, a reversion after an estate tail is not assets; but that is only in the sense of the heir's not being charged with the debt: and yet at law it is assets whenever it vests and comes into possession. The case of *possessio fratris*, that was put, is mistaken; for, certainly, the sister would be liable, and so it appears from *Thompson's Entries*, 420. and 1 *Lutw.* 504. because she must shew how she became heir, and that she is heir to him who is heir to the land. A judgment differs from a bond only in this respect, that execution may be taken upon it directly, without farther action, as to the time of 500 years. That is not an objection to this case, but to the nature of the thing; for it would be the same if there had been a judgment: it would go in course of descent, and why should it not descend *cum onere*?

Note, that the question as to *Blacket's* bond, which was paid out of the personal estate, was, whether he having a collateral personal security, the creditors should also stand in his place as bond creditors, and so take part of the real estate, as his bond would have done. But that was not now argued, having being spoken to at a former hearing; and the other question only directed to be argued again.

Lord Chancellor.—The first question is upon 3 and 4 *W. and M.* ch. 14. whether this reversion in fee, now come into possession, ought to be considered as assets for the payment of bond debts? I had great doubt of it upon the first hearing, the question being new and never yet determined; but, having deliberated
upon

upon it, I am of opinion that the reversion, now come into possession, is become assets to pay the debts. I agree it must depend upon the construction of the statute: for, before that, there was no method either at law or in equity to make lands devised and the descent broke liable to debts. The reason whereof was, that the ancestor, by his specialty, bound the heir and nobody else; and not even the heir unless he was named, but only the executors and administrators: but, where the heir was named, the law was not so unreasonable as to say, he should be personally bound farther than the extent of what came to him by descent; so that, if nothing descended, he was not subject at all. The devisee, on the other hand, was never bound; the heir being only so by naming him, and the devisee being no representative, which was very unreasonable: for, as the estate in the hands of the ancestor was so far liable that a judgment would have bound it in him, and if he had died, leaving it to descend, the heir must have applied it, it was very hard to say that a voluntary act of the obligor should defeat the charge.

Different statutes have been made to prevent fraudulent conveyances: the 13 *Eliz.* is one of them, but it does not meddle with wills. The law presuming a consideration for a devise, the statute 3 and 4 *W. and M.* therefore became necessary, not only to give a remedy in equity, where there was no ground for one before, (since, otherwise, it would be saying a person should be chargeable here who was not chargeable at law), but, as this was an injustice and defect in the law, and to remedy it was this law made, we must then consider

sider whether this case be within the intention of the statute ; and next, if the words be sufficient to attain that end. What is the intent ? The relief of creditors against fraudulent devises ; that is, to give the creditors a remedy notwithstanding the devise : not that the law thought these devises *mala in se*, any more than the 13 *Eliz.* does conveyances as actual frauds in themselves, but as they defeated creditors, and not otherwise. This was the general view ; and, not framing the law, it was immaterial to enquire nicely, whether the devise was made by the obligor himself, or by a consequential debtor, the heir ; because either the one or the other prevented the creditor from having his debt out of that, which, if suffered to go by descent, would have been liable to pay his debt ; and the general intent was, to put them all upon such a footing as they would have been if the heir had taken by descent. Now, if there are words in the statute, the construction must be in that manner. We must not add words, but put such construction upon those in the act, as will best answer the end and intent of it, as far as the words will bear. So has 13 *Eliz.* been extended, as in *Twyne's* case, 3 *Co.* 82 *a.* by the most liberal construction ; and even in criminal cases, as 33 *H.* 8. ch. 23. for trials of murder, where criminals fly from one country to another, a power is given to try them by commission. The enacting part says, *within the kingdom or without*, which certainly was not meant to foreign parts, but probably *Wales* or the northern counties ; and yet, by force of these words, commissions have issued to try murders committed abroad, as in the *West Indies*, *Baltic*, &c. (though these words were thrown in for
another

another purpose), to suppress the mischief. In the present case, therefore, the court ought to make the most liberal construction to avoid the evil intended to be remedied. Now, what are the words? The preamble recites, that whereas it is not reasonable or just that, by the practice or contrivance of any debtors, their creditors should be defrauded of their just debts; and nevertheless it has so happened that several persons having by bond, &c. bound themselves and their heirs, &c. and died seised, having devised, &c. the enacting clause says, "Therefore all wills and testaments," &c. Now, the objection is, that the preamble is applied to a particular case, the words of the enacting clause tied up to that. If the preamble is so, the court can go no farther; and it is insisted likewise, that the only case in the preamble is, where persons who are obligors devise, and that the clause confirms it, making the devise void only against such creditors. But I am of opinion, that construction is much too strict, and that the words do not warrant it; there being two parts, and no reason to say that the preamble is tied up to one of them. The first case is a general one, that "it is not reasonable that, by contrivance of any debtors, their creditors should be defrauded of their just debts." Then follows a particular case, where one, who bound himself and his heirs, devises. The first words being general, the putting afterwards of a particular case will make no difference. Suppose it had been framed with only the first clause of the preamble, there could be no doubt upon it; and certainly the subsequent words do not so restrain the others as to make them useless. They are only by way of instance, not to make the

ad

act less comprehensive. This, indeed, would take in all sorts of debts, those by simple contract as well as by bond; but then a devise could not be said to be in fraud of a simple contract creditor; because, though the lands had descended, they would not have been liable to his debt. Who is debtor? Certainly the obligor, and so is the heir at law; he is called so by the common law; so are all the cases, and the judgments against him prove it. *Plowden*, 440. shews that the action is brought against the heir, as bound in the specialty; and, if he was charged only in the *detinet*, it was error before the statutes of jeofails, which cure it after verdict; because he is debtor, and it lies upon him to discharge himself. Indeed, if he plead fairly, he shall be discharged according to his case; but, if he suffers judgment to go against him by default, he will be personally charged, which shews the difference between an heir and an executor; for if an executor lets judgment go against him by default, yet the creditor has judgment only *de bonis testatoris*; but, against the heir, it is a general judgment; so that it is plain the heir is a debtor, but such an one as may discharge himself by plea. If this is so, and the enacting clause makes all wills void only as against such creditor, that is, such only as could be defrauded by the devise, what is the construction of the statute upon the whole? That the fraud against creditors of any debtor (and the heir is a debtor in point of law, and within the words *any debtor*) ought not to be allowed. So I think that the act must be construed to prevent the mischief, and that the devise of an heir at law is within the statute; and whether the lands be in possession or reversion, is just

the same thing. It may be said, that the case of the obligor's dying and suffering the lands to descend, and the heir's devising them and dying, is provided for by f. 5. of the statute. But that is giving the creditor only the remedy of following the heir's personal estate; for, unless the devise be fraudulent within this statute, the lands cannot be liable to pay his debt, but only the personal estate of the heir; which would hold in the case of a reversion after an estate for life, or any other interest devised by the heir, and the same question would have been made if the lands had been in possession. It is said, a reversion expectant upon an estate tail is not assets, and the heir may plead *riens per descent*; but that does not prove that the reversion in fee, when fallen into possession, shall not be liable. If it had been suffered to descend, though through ten descents, it would have been liable, and the heir charged in the *debet and detinet*, as in *Kellow v. Rowden*, 3 Mod. 253. It is said, this reversion was never liable to the debts, but I think it is enough that there was a possibility of its being liable: there was a liability in it, a quality in it to be so, to be subject to the debt. The saying a reversion in fee after an estate tail is not assets, is a *gross* expression, not accurate, and arises from the method of pleading allowed to the heir, that he may plead *riens per descent*; but, if the creditor may take the reversion, when it comes into possession, it shews a liability in the thing to be assets. It is like a right descending; or, suppose a rent-sock descended, and the heir never had seisin, he might plead *riens per descent*; and if the creditor took judgment against the assets, *quando acciderint*, he might extend it whenever the heir got seisin. So, if a dry feignory

feignory descended, the heir pleaded the same plea, and the creditor took the like judgment, because it was a thing which could not be valued; but if after, a tenancy escheated, the creditor might take out a *scire facias* on his judgment, and reach the tenancy, though the inheritance never was in the obligor, by reason of the quality in the land. 2 *Inst.* 293. This shews that the expression of not being assets is a *gross* expression, and cited only in respect that it is of no present value. Then it is said the heir might have disposed of it: so he might; but, upon *Apharry v. Bodingham, Cro. Eliz.* 350: I doubt such a conveyance would have been void by the statute. The heir at law, as tenant in tail, might no doubt have barred it; but that may be said in all cases where a reversion in fee after an estate tail descends, and where both descend from the same ancestor, and a fine only has been levied. The entail, being barred by that means, has let in a bond, which only affected the reversion in fee. Some ambiguity arises in this case, from the two interests being in the same person; but if the estate tail was in a stranger, when it would not be in the heir's power to bar it, but the stranger might, the law would call the reversion not assets; and yet, wherever the entail be and the heir has no power over it, if he devises it and the entail determines, will it not be liable? I think clearly it would; and, in this sense, it stands free from the objection of the heir's being able to bar it. Suppose the obligor himself had devised the reversion, all the reasons of its being of no value and not liable, and not assets at his death in the hands of the heir, and consequently not a devise in fraud of creditors, would hold in that

case as well as in this; yet it is admitted that would have been within the act. The case put of *possessio fratris*, where the sister has the land, I am of opinion is wrong, and that the lands would be liable in her hands; but then they must shew the intermediate descents, according to Lord Holt in *Kellow v. Rowden, Carth. 126*. The action must be brought against her as heir to her brother, who was heir to her father. I think such an action may be brought; and, to the best of my memory, there is a precedent how to frame it in *Clift's Entries* against the heir at law of the first obligor in the second degree, and also joining the devisee of the first heir at law. But it is said, that if such an action was brought against the defendant here, he might plead that the heir, whose devisee he was, took *riens per descent*; but I am of opinion that would not be a good plea for the devisee in such case, because the nature of the thing required the heir to say *riens per descent die impetrationis brevis*; and the devisee could not say that with regard to the writ purchased against him. Then he must say, that his testator had nothing by descent which he had devised to him, and the issue would be against him upon shewing this reversion: for the quality of being subject to debts would be an estate in him to pay them. For these reasons I am of opinion, it is agreeable to the intent of the legislature, and of the statute, as well as within the words of it, that this estate should be liable to pay these debts.

The second question is, whether any difference must be made between the specialty and simple contract creditors,

creditors, which are to stand in their places, in regard that this estate was not liable when the devise was made? But I think, upon the reason of this court, in cases of this nature, that the simple contract debts must stand in their place, and that to all intents and purposes as if the specialties were not satisfied. That is the construction of all decrees, where one is to have the like remedy as the other would if not paid.

I have grounded my opinion on the statute, without entering into the question how far courts of equity would go to relieve creditors. It is certain equity has extended the remedy beyond what the law does; as where it decrees the profits, which there is no ground for in the case of fraudulent devises under this statute; but where it is done, it is as being a fruit fallen from what is the creditor's. The like where a sale is decreed. But yet I know no case, where equity decrees a thing itself to be liable, which the law says is not liable, or is not analogous to what the law directs; except only in the case of an advowson in fee, as decreed by Lord King, in *Tong v. Robinson*, and affirmed in the House of Lords in 1730, which my Lord Coke says is not affets, as it cannot be extended, the law giving no remedy but by extent, *quousque debitum fuerit levatum*, except in case of collateral warranty, because there the value of the whole subject is in question.

As to *Blacket's* bond, I think there is no difference in that; for the stock was only a collateral security: and it is declared by the defeazance, that it shall be retransferred, and so no foundation to turn that bond

on the personal estate, and this upon the rule of marshalling assets; as, if there be a mortgage on two estates, and a second only on one, if the estates will satisfy both, they shall be compelled to take, so as that all may find a satisfaction; and therefore the plaintiffs must stand in his place, as well as that of others. And so decreed the estate, descended from *Thomas* the father and devised by *Thomas* the son, to be liable to the plaintiff's debts.

§ 27. In the above cases it appears that the bond was entered into by the person who had been once seised in fee in possession, and afterwards created the limitations of the estate, and was the person who had died last seised of the fee; and therefore the heir, in claiming the reversion, on the determination of the particular limitations, was bound to derive his title to it from the obligor. But, in the following case, the courts went a step farther, and held, that a reversion was assets for payment of the bond debts of an intermediate tenant for life who was entitled to the reversion in fee.

*Smith v.
Parker,
2 Black. 1230.*

§ 28. *Edward Perrot* devised to his brother *Charles Perrot* for life, remainder to his nephew *Robert Perrot* for life, and to his first and other sons in tail, remainder to *Edward John Perrot* for life, remainder to his first and other sons in tail, remainder to two other persons in the same manner, remainder to the testator's right heirs for ever. On the testator's death, *Charles* entered and died; *Robert* died without issue before the testator. *Edward John* entered, and, while in possession,

session, executed the bond in question, and died without issue. The next remainder-man entered, and died without issue; and, all the remainder-men being dead without issue, the lands came into the possession of the defendants, who were heirs at law, both of the testator, and of *Edward John Perrot* the obligor; and *Edward John* was also (while in possession of the premises) heir at law to the testator.

In an action of debt, brought by the obligee of this bond, the question was, whether these lands were assets by descent in the hands of the defendants.

Serjeant *Adair*, for the defendants, argued, that the estate in fee did not descend from the obligor to the defendants: for, though he acknowledged the remainder in fee to have been vested in *Edward John*, yet, being after many intermediate remainders, and three of them estates tail, it was too distant to be an actual seisin of the freehold and inheritance.

It was settled that, where there is tenant in tail with remainder in fee-simple, his estate was not assets, being too remote a contingency.

Lord Chief Justice *De Grey* said, he had no doubt upon the case: the only difficulty that would have arisen in these circumstances, (and that no very considerable one), was, supposing all the successive tenants for life, having in them the reversion in fee, had entered into bonds, which of them should have the

priority. At present, it was clear, that the heir of the obligor was debtor to the obligee, but only liable to pay the debt in respect of the assets, which descended to him. How far, then, was the reversion in fee, which has taken place, assets in the hands of the heir? The true distinction was, that a reversion, expectant on an estate tail, is not immediate assets; and, therefore, it cannot be extended, nor can the heir be compelled to sell it, which he may be in case of a reversion on an estate for life. But such reversion on an estate tail is assets *cum acciderit*; and the heir shall then be chargeable, which was the case before the court.

Mr. Justice *Gould* was of the same opinion; and said, that a reversion after an estate tail was not valuable assets, and, therefore, could not be valued by a jury according to the statute 3 and 4 *Wm. and Mary*, c. 14: but, when it came into possession, it might then be valued, and should charge the heir.

Sir *William Blackstone* was of the same opinion, and observed, that the obligor had actual seisin of this reversion, by his own seisin as tenant for life: he might have sold it, and, therefore, might charge or incumber it; though, strictly speaking, his bond was no charge upon the reversion, but only upon the heir, in respect of such reversion descending. And this reversion was properly, the instant it vested in the heir, assets by descent in his hands, though only dormant potential assets, till it came into possession.

§ 29. The authority of this case has been questioned; and it has been contended, that, where a person takes a reversion by descent, he must make himself heir to the donor, and take it as such, and not as heir to the intermediate heirs; for the intermediate heirs never had such a seisin as to transmit the reversion by descent from them to any one, who was not heir to the first donor; from which it follows, that such reversion would, in his hands, be real affets of the donor, but not affets of any of the intermediate heirs. And, in the case of *Teverdale v. Coventry*, where this question was argued before Lord *Thurlow*, but not decided, and the case of *Smith v. Parker*, was relied on as the only authority, his Lordship said, “The argument
“ there is not worth reading. I do not believe it was
“ reported by Mr. Justice *Blackstone*: there the con-
“ tingent uses never came into possession; it was, there-
“ fore, not a reversion after an estate tail, but after
“ an estate for life only.” And, in giving judgment, his Lordship said it was unnecessary for him to decide upon the question of the reversion: if that had been necessary, the case in the Common Pleas did not so satisfy his mind, as to enable him to decide it, without referring it to a court of common law.

1 Inst. 118.

Vide Tit. 29.
ch. 4.

1 Bro. Rep.
240.

§ 30. Mr. Serjeant *Williams*, in his notes to *Saunders*, says he has compared the case of *Smith v. Parker*, in the report, with the paper-book, which was delivered to one of the learned Judges, who then sat upon the bench; and it appeared by it, and also by a short note taken by him on the paper-book, that the case was correctly stated by Mr. Justice *Blackstone*, and that
the

2 Saund. 8.
note.

Giffard v.
Barber,
Infra.

the court was of opinion the reversion was affets. But the learned Serjeant observes, that the case of *Smith v. Parker* may perhaps be found to be of doubtful authority: and, in a case determined by Lord *Hardwicke*, his Lordship laid it down, that a reversion was not affets for payment of the debts of any person, but the ancestor, from whom the lands immediately descended.

Reversions
after Estates
Tail are
bound by
Judgments.

§ 31. A reversion, expectant upon an estate tail, is liable to the judgments, statutes, or recognizances, of all those who were at any time entitled to it, whenever such reversion comes into possession; because these securities attach on all the estates of the debtor.

Giffard v.
Barber,
4 Vin. Ab.
451.
1 Vef. Rep.
174.

§ 32. Doctor *Cary*, being seised in fee, made a settlement to the use of himself for life, remainder to Sir *George Cary* for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of Sir *George Cary* in tail male, remainder to *William Cary* for life, with like remainder to his first and other sons, remainder to *Nicholas Cary* for life, with like remainders to his first and other sons, remainder to Doctor *Cary* in fee.

Upon the death of Doctor *Cary*, the remainder to Sir *George Cary* came into possession, and the reversion descended to Sir *George Cary*, as heir at law to Doctor *Cary*.

Sir *George Cary* acknowledged a judgment, and died without issue; whereupon the estate limited to *William Cary* took effect, and the reversion in fee descended to him.

him. He had two sons, who died; by which, the reversion came into possession; and the question was, whether the reversion, when it came into possession, was liable to the judgment acknowledged by Sir George Cary.

Lord *Hardwicke* was of opinion, that the reversion was liable to the judgment, because it was the estate of inheritance of Sir *George Cary*: and, as it was so subject to the intermediate estates for life, it was in him liable to be granted, or charged, or incumbered, as he thought fit; and, as he might have granted or charged the reversion, so might he have granted a lease for 1000 years out of it, and which would have taken effect out of the reversion in fee: and, if it had come to *William Cary*, he could not have claimed such reversion but subsequent to that lease; and, as he might have done so, in like manner might he have charged it by judgment or statute. The point that was in *Kel- low v. Rowden*, is not applicable to this case; for, in that action, the second son was charged as immediate heir to his father; but, in this case, the reversion would not be liable to the bond debts of Sir *George Carey* as assets by descent, because that cannot be where there is an intermediate estate, but must be where the heir takes as immediate heir to the ancestor, who entered into the bond. But, on judgment, you charge the terre-tenant of the estate that was in the person who acknowledged the judgment, but not so by his bond, unless the lands came as assets by descent to the very heir of Sir *George Cary*. This, said his Lordship, will not be liable to the inconveniencies I first apprehended; for, if either
of

Ante, c. 29.

of the persons that took an estate tail had suffered a recovery, there would have been an end of the reversion in fee. Where there is a tenant in tail, with reversion to him in fee, and this reversion descends to the defendants, they must take it, liable to the judgment or statute, or recognizance of any of their ancestors, in whom the estate at any time was: and, therefore, I am of opinion, that this reversion is liable to the judgment.

And also by
Leases.

§ 33. A reversion, expectant upon an estate tail, is liable to the leases made by all those who were at any time entitled to it, and to all covenants contained in the leases, whenever such reversion comes into possession.

Symonds v.
Cudmore,
4 Mod. 1.

§ 34. *William Martin*, being tenant in tail with the immediate reversion in fee in himself, demised the premises to *Elizabeth Westcombe* for 99 years, if two persons should so long live, to commence after the determination of a preceding lease. *William Martin* died, leaving issue *Nicholas Martin* his eldest son and heir; who, being the issue in tail, and also entitled to the immediate reversion in fee, levied a fine to the use of himself and his heirs.

Vide Tit. 35. It was resolved, that, as the reversion in fee came into possession by the operation of the fine, the lease became a charge on that reversion, and could not be avoided either by *Nicholas Martin* or the cognizee of the fine.

§ 35. *Charles*

§ 35. *Charles Lord Shelburne*, being tenant in tail male of the lands in question, with remainder to his brother *Henry* in tail male, remainder to his own right heirs; demised them for three lives, with covenants for perpetual renewal. *Charles Lord Shelburne* died without issue, by which means his brother *Henry* became entitled to an estate in tail male in the premises, with the reversion in fee in himself. In the year 1697, *Henry Lord Shelburne* levied a fine of those lands, and, in consideration of his marriage, settled them on himself for life, with remainder to his first and other sons.

Shelburne v. Biddulph,
6 Bro. Parl.
Ca. 356.

The lessees having claimed a renewal on the death of some of the persons for whose lives the leases were granted, *Henry Lord Shelburne* refused to renew, alleging that, as his brother *Charles* was only tenant in tail of the lands comprised in those leases, he had no power to make them, and was not bound by the covenants for renewal.

The Court of Exchequer in *Ireland* decreed, that *Henry Lord Shelburne* should renew those leases. From this decree, there was an appeal to the House of Lords; and, on behalf of the appellants, it was argued, that the tenant in tail at law, independent of the statute 32 *Hen. 8.* had no right to make a lease absolutely to bind the issue in tail, and much less the remainderman; and that, even by that statute, a tenant in tail has no power to grant leases to bind those in remainder; and, therefore, the leases in question were absolutely void,

void, as against the appellant, who did not claim under Lord *Charles*, or as issue in tail, but as remainderman. That the estate tail, out of which the leases first arose, being spent, and the appellant not claiming under it but by a distinct limitation to himself in tail male, his fine could not let in Lord *Charles*'s leases upon that estate, which came in lieu of the Earl's estate tail; nor could it, by consolidating the two estates, let them in upon the reversion, both because the Earl acquired a new estate, and because the uses of the fine were never declared to him in fee, but directly to the uses of the settlement, by which, in consideration of his own marriage, the Earl had an estate for life only, with remainder to his first and other sons: and these estates arose and were granted out of the estate tail, which the Earl had before the fine, and not out of a reversion.

On the other side, it was contended, that, by the fine, which Earl *Henry* levied in 1697, the estate tail, limited in remainder to him, was barred and extinguished in the same manner to all intents and purposes, as if he was dead without issue; and the reversion in fee, which descended to him as heir of Lord *Charles*, immediately took effect in possession. And, as the new uses of the marriage settlement of 1697 arose out of that reversion in fee, they were therefore subject to all antecedent incumbrances and engagements, which could affect that reversion. That, as this reversion in fee, after it had taken effect in possession by means of a fine, was specifically bound by the covenants for perpetual

petual renewal; and, as such covenants are considered as real agreements, and go with the land, so they are, in their nature, proper for a specific performance, and would, in equity, affect the legal interest of all those who take the estate with notice of them. That all those claiming under the settlement of 1697, had notice of these leases and covenants, and were as much bound by an equitable lien upon the lands as Earl *Henry* himself, especially in favour of lessees who had made very great improvements, and were therefore to be considered as purchasers of the right of renewal. After hearing counsel on this appeal, the following question was put to the Judges, *viz.* “Whether, by the fine levied by the appellant the Earl of *Shelburne* in *Easter* term 1697, the reversion in fee of the estate in question was let in, subject to the leases in question, made by *Charles* Lord *Shelburne*, and the covenants therein contained for a perpetual renewal?” And, the Lord Chief Justice of the King’s Bench having delivered the unanimous opinion of the Judges to this effect, *viz.* “That the leases for lives now in being were good and effectual, as being served out of the reversion in fee, which Lord *Charles* had when he made them, and which was now in Lord *Henry*; and that the covenants for renewal were binding on Lord *Henry* as a lien on the same reversion, which he had let in by barring, discharging, and extinguishing his estate tail.” It was, therefore, ordered and adjudged, that the appeal should be dismissed, and the decree therein complained of affirmed.

All particular Estates merge in the Reversion.

§ 36. All particular estates are subject to merge in the reversion, whenever the same person becomes entitled to both; except estates tail. And, where the protection of the statute *de donis conditionalibus* is taken from an estate tail, it becomes merged, and lets the reversion into possession. And it has been shown, that the reversion then becomes liable to the charges and leases of all those who were entitled to it.

Ante, f. 25.

TITLE XVIII.

JOINT-TENANCY.

CHAP. I.

Of the Nature of an Estate in Joint-tenancy.

CHAP. II.

By what Means a Joint-tenancy may be severed and destroyed.

CHAP. I.

Of the Nature of an Estate in Joint-tenancy.

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| § 1. <i>Number and Connection of the Tenants.</i>
2. <i>Estates in Severalty.</i>
3. <i>In Joint-tenancy.</i>
7. <i>Unity of Interest.</i>
12. <i>Unity of Time.</i>
20. <i>Unity of Possession.</i>
21. <i>Joint-tenancies go to the Survivor.</i>
26. <i>Not favoured in Equity.</i>
28. <i>Who may be Joint-tenants.</i> | 35. <i>Husband and Wife cannot be Joint-tenants.</i>
41. <i>Joint-tenancies for Life.</i>
43. <i>With several Inheritances.</i>
49. <i>Joint-tenants cannot charge their Estates.</i>
54. <i>No Dower of a Joint-tenancy.</i>
55. <i>Nor Curtesy.</i>
56. <i>In what Acts they must join.</i>
61. <i>Remedies against each other.</i> |
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Section 1.

WITH respect to the number and connection of the owners of estates, they may be held in four different ways: in severalty, joint-tenancy, coparcenary, and common.

Number and Connection of the Owners of Estates.

Joint-tenancy in severalty.

§ 2. Where a person holds lands in his own right only, without having any other person joined or connected with him in point of interest, during his estate therein, he is said to hold in severalty.

Joint-tenancy. § 277. Rule 2.

§ 3. But where lands are granted to two or more persons, to hold to them and their heirs, or for term of their lives, or for term of another's life, without any restrictive, exclusive, or explanatory words; all the persons named in such instrument, to whom the lands are so given, take a joint estate, and are called *joint-tenants*. For the law will interpret such instrument so as to make all the parts take effect, which can only be done by creating an equal interest in all the persons who take under it.

1 Inst. 180 b.

§ 4. Lord *Coke* says, that if a rent charge of 10^l. be granted to *A.* and *B.*, to have and to hold to them two, *viz.* to *A.* till he be married, and to *B.* till he be advanced to a benefice, they are joint-tenants in the mean time, notwithstanding the limitations; and, if *A.* die before marriage, the rent shall survive. But, if *A.* had married, the rent should have ceased for a moiety, *et sic é converso*, on the other side.

§ 278.

§ 5. An estate in joint-tenancy can only arise by purchase or grant; that is, by the act of the parties, and never by the mere act of law. *Littleton* says, that if two or three persons disseise another of any lands or tenements to their own use, then the disseisors are joint-tenants. But this mode of acquiring lands is now disused.

§ 6. An

§ 6. An estate in joint-tenancy may be had in remainder or reversion. Thus, Lord *Coke* says, that if a gift be made to two men and the heirs of their two bodies, remainder to them two and their heirs, they are joint-tenants of the remainder in fee. 1 Inst. 133 b.

§ 7. Sir *William Blackstone* observes, that the nature of this estate requires, 1, unity of interest; 2, unity of title; 3, unity of time; and, 4, unity of possession; or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at the same time, and held by one and the same undivided possession. Unity of Interest. 2 Comm. 180.

§ 8. As to the unity of interest, one joint-tenant cannot be entitled to one period of duration or quantity of interest, and the other to a different one: one cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other tenant in tail. It should, however, be observed, that where an estate is limited to three persons and to the heirs of one of them, they are joint-tenants for life. Vide *Wiscott's case*, Infra, ch. 2.

§ 9. Lord *Coke* says, that if a man demises lands to two, to have and to hold to the one for life, and to the other for years, they are not joint-tenants: for an estate of freehold cannot stand in jointure with a term for years, and a reversion upon a freehold cannot stand in jointure with a freehold and inheritance in possession. 1 Inst. 188 a.

Idem.

§ 10. It is, however, said by Lord *Coke*, that a right of action and a right of entry may stand in jointure. For, at the common law, the alienation of the husband was a discontinuance to the wife of one moiety, and a disseisin of the other; so as, after the death of the husband, the wife had a right of action to one moiety, and the other joint-tenant a right of entry into the other: but they were joint-tenants of the right, because they might join in a writ of right.

Secondly, that a right of action, or a bare right of entry, could not stand in jointure with a freehold or inheritance in possession; and, therefore, if the husband made a feoffment of the moiety, this was a discontinuance of that moiety, and the other joint tenant remained in possession of the freehold and inheritance of the other moiety, which, for the time, was a severance of the jointure.

Unity of
Title.

§ 11. As to the unity of title, the estate of joint-tenants must be created by the same act or instrument, whether legal or illegal; as by one and the same grant, or by one and the same disseisin: for a joint-tenancy cannot arise by descent or act of law, as has been already observed, but merely by purchase or acquisition of the party.

Unity of
Time.

§ 12. As to the unity of time, the estate must become vested in all the joint-tenants at one and the same instant, as well as by one and the same title.

§ 13. Thus,

§ 13. Thus, Lord *Coke* says, if lands be demised for life, the remainder to the right heirs of J. S. and J. N. J. S. hath issue and dies, and after J. N. hath issue and dies: the issues are not joint-tenants, because the one moiety vested at one time, and the other moiety at another time. 1 Inst. 188 a.

§ 14. Lord *Coke*, however, says, that in some cases there may be joint-tenants, and yet the estate may vest in them at several times. If a man makes a feoffment to the use of himself and of such wife as he shall afterwards marry, for term of their lives, and after he takes a wife, they are joint-tenants; and yet they come to their estates at several times. Idem. Tit. 16. c. 5. f. 1.

§ 15. Mr. *Hargrave* seems to think, that it is only allowed in cases of uses, and that it would be otherwise at common law; and says, the reason of the difference is, that in the case of a use, the estate is vested and settled in the feoffees, till the future use comes in esse. 1 Inst. 188 a. n. 13. Blandford v. Blandford, 3 Bull. 101.

§ 16. A person levied a fine to the use of himself for life, remainder to his wife for life, remainder to Sir *Peter Temple* and *Anne* his wife for their lives and the life of the survivor of them; remainder to their first and other sons in tail, remainder to the issues females of their bodies, and the heirs of their bodies begotten. Sir *Peter Temple* had issue by *Anne* two daughters, *Anne* and *Martha*. *Martha* died without issue; afterwards *Anne* died. Suffex v. Temple, 1 Ld. Raym 310.

Ante.

It was argued, that the two sisters were tenants in common; but, *per Holt*, the estate is limited by way of use to the issues females, and issues females comprehend all issues females. Then the case is, tenant for life, remainder to all his issues females, &c. If the tenant for life has but one daughter, she shall have the whole estate tail; if he has more daughters, they shall be joint-tenants for life, with several inheritances. The case in *Co. Lit.* 188 a. of a feoffment to the use of himself for life, and of such wife as he should afterwards marry, and then he marries, he and his wife are joint-tenants; this case will rule the case in question: for it is a joint claim by the same conveyance, which makes joint-tenants, and not the time of the vesting.

Stratton v.
Best, 2 Bro.
Rep. 233.

§ 17. A settlement was made before marriage to trustees, in trust to permit the husband to take the profits for 99 years, if he should so long live; and, after his decease, to permit the intended wife to take the rents and profits for her life; and, after the decease of the survivor of them, to permit all and every the child and children of the body of the husband begotten on the body of the wife to take the rents, issues, and profits of the said premises to them and their heirs for ever.

Lord *Thurlow* declared, that, according to the true construction of the settlement, the estates were to be considered as settled on the children in joint-tenancy. And, on an appeal, his Lordship said, that, whether the settlement was to be considered as the conveyance of

of a legal estate, or a deed to uses, would make no difference ; and that the vesting at different times would not prevent its being a joint-tenancy.

§ 18. A person devised lands to his two sons, and the heirs of their bodies ; and that his executors should have them until they came to their several ages of 21 years.

Aylor v.
Chep,
Cro. Ja. 255.

The question was, whether one of them might enter ; for it was objected that it was a joint estate to them, which could not be if they should have several commencements. But four of the Judges were of opinion, that when either of them came to the age of 21, he should then have his part and possession, and yet the joint-tenancy should take place.

§ 19. Lands were devised to a woman and her children, on her body begotten or to be begotten by *W. A.*, and their heirs for ever.

Oates v.
Jackson,
2 Stra 1172.

It was determined, that the devisee and all her children took as joint-tenants ; and it was no objection that by this means the several estates might commence at different times,

§ 20. The last requisite to a joint-tenancy is unity of possession. Joint-tenants are said to be seised *per my, et per tout* ; that is, each of them has the entire possession as well of every part as of the whole. They have not one of them a seisin of one half, and the other of the remaining half ; neither can one be exclusively seised of one acre, and his companion of another. But each

Unity of
Possession.
Lit. f. 283.

has an undivided moiety of the whole, and not the whole of an undivided moiety ; from which it follows, that the possession and seisin of one joint-tenant is the possession and seisin of the other.

Joint-tenancies go to the Survivor.

f. 280.

§ 21. The union and intirety of interest, which exists between joint-tenants, has given rise to the principal incident to an estate in joint tenancy, which is the right of survivorship. Thus, *Littleton* says ; “ If three
“ joint-tenants be in fee-simple, and the one hath issue
“ and dieth, yet they which survive shall have the
“ whole tenements, and the issue shall have nothing.
“ And, if the second joint-tenant hath issue and die,
“ yet the third which surviveth shall have the whole
“ tenements to him and his heirs for ever.” And Lord *Coke* says, that this is called, in law, *Jus accrescendi*.

f. 281.

§ 22. The right of survivorship takes place in chattels real, as well as in freehold estates. Thus, *Littleton* says ; “ If a lease of lands or tenements be made
“ to many for term of years, he which surviveth of
“ the lessees shall have the tenements only during the
“ term by force of the same lease.” And this benefit of survivorship takes place on a lease for years to two, though one of the lessees dies before entry,

1 Inst. 182 a.
n. 1.

§ 23. A trust of a term in joint-tenancy, shall go to the survivor in equity as well as at law.

Rex v.
Williams,
Bun. 342.

§ 24. Two joint purchasers of a lease for years, assigned it to a third person, who was a friend of one of the joint-tenants, and with the consent of the other.

But

But it was without consideration, and no declaration of trust was given; which the defendant confessed in his answer.

The question was, whether this trust should result for the benefit of the survivor; or, whether the creditors of the joint-tenant, who died, should come in for an equal moiety in equity? The two joint-tenants had continued to receive the profits jointly, after the assignment.

The court were of opinion, that, though survivorship is looked upon as odious in equity, yet, in this case, the trust should survive for the benefit of the surviving *cestuique* trust only.

§ 25. There are some cases in which there may be a joint-tenancy without an equal right of survivorship. Thus, Lord *Coke* says, if lands are let to *A.* and *B.* during the life of *A.*, if *B.* dies, *A.* shall have all by survivorship; but, if *A.* dies, *B.* shall have nothing.

1 Inst. 181 b.
193 a.

§ 26. As the right of survivorship is often attended with hardships and injustice, Lord *Hardwicke* says, the courts of equity have taken a latitude in construing against joint-tenancies, on the ground of intent; and have, therefore, determined, that if two men jointly and equally advance a sum of money on a mortgage in fee, and take the security to them and their heirs, there shall be no survivorship; and, if they were to foreclose the estate, it should be divided between them: because their intention is presumed to be so. It has been said, indeed,

Joint-tenancy
not favoured
in Equity.

2 Vef. 258.

Petty v.
Styward,
1 Ab. Eq.
290.

indeed, (says he), that, if two men make a purchase, they may be understood to purchase a kind of chance between themselves, which of them shall survive : but, it has been determined, that, if two purchase, and one advances more of the purchase money than the other, there shall be no survivorship.

Lake v.
Craddock,
3 P. Wms.
158.

§ 27. The defendant *Craddock's* father, the plaintiff *Lake*, and three others, (five in all), having entered into an undertaking to drain the overflowed lands of *West Thorock*, the trustees for the sale, by the consent and direction of the commissioners of sewers, did, by deed indented and inrolled, dated the 8th of *February* 1695, in consideration of 5145 *l.* paid to the commissioners by the five purchasers, convey the same to the defendant *Craddock's* father, the plaintiff *Lake*, the three others, and their heirs ; upon which, several sums of money were expended, in carrying on the undertaking,

The plaintiff *Lake* brought his bill against the rest of the partners or their representatives, for an account and division of the partnership estate : and the only question was, whether, these five purchasers having made this purchase jointly, so as to become in law joint-tenants, the same should survive in equity ?

Sir *Joseph Jekyll*, on debate, decreed, that the survivorship should not take place ; for that the payment of money created a trust for the parties advancing the same : and, an undertaking upon the hazard of profit or loss was in the nature of merchandising, when the

jus

jus accrescendi is never allowed : that, supposing one of the partners had laid out the whole money, and had happened to die first, according to the contrary construction, he must have lost all; which would have been most unjust. Wherefore, it was decreed, that these five purchasers were tenants in common; and, upon appeal, this decree was affirmed by Lord Chancellor King.

§ 28. All natural persons may be joint tenants; but bodies politic or corporate cannot be joint-tenants with each other: neither can the king or a corporation, whether sole or aggregate, be joint tenant with a natural person.

Who may be
Joint-tenants,
Lit. f. 296.

§ 29. Thus, Lord Coke says, if lands be given to two bishops to have and to hold to them two, and their successors, seeing they take this purchase in their political capacity as bishops, they are not joint-tenants, because they are seised in several rights: for the one bishop is seised in right of his bishopric of the one moiety, and the other bishop in right of his bishopric of the other moiety; and so by several titles, and in several capacities. Whereas joint-tenants ought to have it in one and the same right and capacity, and by one and the same joint title.

1 Inst. 190 a.

§ 30. But, if lands be given to *A. de B.*, bishop of *N.*, and to a secular man, to have and to hold to them two, and to their heirs, in this case, they are joint-tenants: for each of them takes the lands in his natural capacity.

Idem.

§ 31. This

Idem.

§ 31. This rule does not hold in the case of chattels real; for, if a lease for years be made to a bishop and a secular man, they are joint tenants, because the bishop does not take in his political capacity.

Idem.

§ 32. If lands be given to the king, and to a subject, to have and to hold to them and to their heirs, yet they are not joint-tenants; for the king is not seised in his natural capacity, but in his royal and political capacity, *in jure coronæ*; which cannot stand in jointure with the seisin of the subject in his natural capacity.

1 Inst. 180 b.
n. 2. 186 a.

§ 33. Lord *Coke* says, that if an alien and a natural born subject purchase lands in fee, they are joint-tenants; but the king, upon office found, shall have a moiety.

Lit. f. 291.

§ 34. A husband and wife being considered in law as one person, if an estate be conveyed to husband and wife, and to a stranger, the husband and wife will only take one moiety between them, and the stranger will take the other moiety.

Husband and
Wife cannot
be Joint-
Tenants..

Lit. f. 291.

§ 35. Husband and wife being but one person, there can be no moieties between them; and, therefore, where an estate is conveyed to a man and his wife, and their heirs, it is not a joint-tenancy: for joint-tenants take by moieties, and are each seised of an undivided moiety of the whole. But husband and wife, being but one person, cannot, during the coverture, take
separate

separate estates; and, therefore, upon a purchase made by them both, each has the entirety, and they are seised *per tout*, and not *per my*. The husband, therefore, cannot forfeit or alien the estate; because the whole of it belongs to his wife as well as to himself.

§ 36. *William Ocle* and *Joan* his wife, purchased lands to them two, and their heirs. Afterwards, *W. Ocle* was attainted of high treason for the murder of the king's father, *Edw. 2.* and was executed: *Joan* his wife survived him. *Edward 3.* granted the lands to *Stephen de Bitterby* and his heirs. *John Hawkins*, the heir of the said *Joan*, in a petition to the king, disclosed this whole matter; and, upon a *scire facias* against the patentee, had judgment to recover the lands. 1 Inst. 187 a.

§ 37. *John Andrews* purchased a copyhold estate, and took a surrender of it to himself, his wife, and his daughter, and their heirs. *John Andrews*, being visible owner of the estate, mortgaged it to the plaintiff, and died. The plaintiff brought his bill against the mother and daughter to discover their title, and to set aside their estates as fraudulent against the plaintiff, who was a purchaser. Back v. Andrews,
2 Vern. 120.
Prec. in Cha.
1.

The court dismissed the bill, because the husband and wife took one moiety by entireties, so that the husband could not alien or dispose of it so as to bind the wife, and the other moiety was well vested in the daughter.

§ 38. A copy-

Green v.
King,
2 Black. R.
1211.

§ 38. A copyhold estate was surrendered to the use of *John Fitzwalter* and *Elizabeth* his wife, and the longer liver of them; and, after the death of the longer liver of them, to the right heirs of the said *John* and *Elizabeth* for ever.

Lord-Chief Justice *De Grey* said, that this case fell exactly within a nice distinction, laid down in our ancient law-books; and which, having never been over-ruled, continued to be law. The same words of conveyance, which would make two other persons joint-tenants, will make a husband and wife tenants of the entirety; so, neither can sever the jointure, but the whole must accrue to the survivor.

Sir *William Blackstone* observed, that this estate differed from joint-tenancy, because joint-tenants take by moieties, and were each seised of an undivided moiety of the whole, *per my et per tout*; which drew after it the incident of survivorship or *jus accrescendi*. But, husband and wife being considered in law as one person, they cannot, during the coverture, take separate estates; and, therefore, upon a purchase made by them both, they cannot be seised by moieties, but both and each had the entirety. They were seised *per tout*, and not *per my*: the husband, therefore, could not alien or devise that estate, the whole of which belonged to his wife as well as to himself.

Doe v.
Parratt,
5 Term R.
652.

§ 39. A person devised a copyhold estate to *John Freestone*, and *Lucy* his wife, and to their heirs and assigns

assigns for ever. *J. Freestone* the devisee, was admitted, and surrendered it to *James Rickson* in fee.

Upon the death of *John Freestone*, *Lucy* the widow was admitted, and brought an ejectment against the person who claimed under her husband's surrender.

Lord *Kenyon*.—“ We are now in a court of law,
 “ and we are called upon to decide the legal rights of
 “ the parties. It seems to me, from the manner in
 “ which the case is drawn, that it was intended to be
 “ argued that the devise in the first will to *J. Freestone*
 “ and *Lucy* his wife, created a joint-tenancy ; but that
 “ question has been properly abandoned : for, though
 “ a devise to *A.* and *B.*, who were strangers to, and
 “ have no connection with, each other, creates a joint-
 “ tenancy, the conveyance by one of whom severs the
 “ joint-tenancy and passes a moiety, yet it has been
 “ settled for ages, that, when the devise is to the hus-
 “ band and wife, they take by entireties, and not by
 “ moieties ; and the husband alone cannot, by his own
 “ conveyance, without joining his wife, divest the
 “ estate of the wife. This is sufficient to warrant us,
 “ sitting in a court of law, in determining in favour
 “ of the present plaintiff.”

Owen v.
Morgan,
Tit. 36.

§ 40. But, where an estate is conveyed to a man and a woman, who are not married together, and who afterwards intermarry, as they took originally by moieties, they will continue to hold by moieties after the marriage.

1 Inst. 187 b.
Moody v.
Moody,
Tit. 36.

§ 41. Where

Joint-tenants
for Life.

Lit. f. 285.

§ 41. Where lands are conveyed to two persons, and to the heirs of one of them, they are joint-tenants for life, and the fee-simple is in one of them: and if the person who has the fee dies, the other shall hold the entirety by survivorship during his life. In the same manner, where lands are given to two persons, and the heirs of the body of one of them, they are joint-tenants for life, and the estate tail is in one of them.

1 Inst. 184 b.
n. 2.

§ 42. Lord *Coke* says, that when land is given to two, and to the heirs of one of them, he, in the remainder, cannot grant away his fee-simple.

Mr. *Hargrave*, in his excellent notes on Lord *Coke's First Institute*, observes, that there is a seeming difficulty in this passage; but conceives Lord *Coke's* meaning to be, that though, for some purposes, the estate for life of the joint-tenant having the fee is distinct from, and unmerged in his greater estate, yet, for granting, it is not so; but both estates are, in that respect, consolidated, notwithstanding the estate of the other joint-tenant: and, therefore, that the fee cannot, in strictness of law, be granted as a remainder *eo nomine*, and as an interest distinct from the estate for life.

With several
Inheritances.

§ 43. Two persons may have an estate in joint-tenancy for their lives, and yet have several inheritances.

f. 283.

Thus, *Littleton* says, if lands be given to two men, and to the heirs of their two bodies begotten, the donees have

have a joint estate for term of their lives, and yet they have several inheritances : for, if one of the donees hath issue and die, the other which surviveth shall have the whole for term of his life. And if he which surviveth, also hath issue and die, then the issue of one shall have one moiety, and the issue of the other shall have the other moiety ; and they shall hold the land between them in common, and are not joint-tenants, but tenants in common. And the cause why such donees have a joint estate for term of their lives, is, for that at the beginning the lands were given to them two ; which words, without more saying, make a joint estate to them for term of their lives. And the reason why they shall have several inheritances, is this, inasmuch as they cannot, by any possibility, have an heir between them, as a man and woman may, the law will that their estate and inheritance be such as is reasonable, according to the form and effect of the words of the gift ; and this is to the heirs which the one shall beget of his body by any of his wives, and to the heirs which the other shall beget of his body by any of his wives ; so as it behoveth, by necessity of reason, that they have several inheritances.

§ 44. It is the same, where lands are given to two females, and the heirs of their two bodies. Lit. f. 284.

§ 45. Lord Cowper, in the case of *Cook v. Cook*, says, in a devise to the testator's two daughters, and the heirs of their bodies, the rule of law is, it is a joint estate for life, and several inheritances ; but the testator never meant that the surviving daughter should turn out the 2 Vern. 545.

issue of her deceased sister : and that was the point upon the appeal in *Wilkinson v. Spearman*, where the Lords inclined for the appellant ; yet, the Judges all agreeing that the law was so settled, the Lords would not alter it. And his Lordship said, that a devise to the testator's two daughters and their issue, and, in default of such issue, to J. S., they have a joint estate for life, and several inheritances. If one of the daughters dies without issue, there shall not be cross remainders ; but her moiety shall go over to the remainder-man, upon the death of the daughter, for want of such issue, that is, such respective issue.

1 Inst. 184 a.

§ 46. Lord *Coke* says, if a person gives lands to two men and one woman, and the heirs of their three bodies begotten, in this case, they have several inheritances : for, although it may be said that the woman may, by possibility, marry both the men, one after another, yet, first, she cannot marry them both *in presenti*. And the law will never intend a possibility, as, first to marry the one and then to marry the other : and so it is, if a gift be made to one man and two women, *mutatis mutandis*. In the same manner, if a gift in tail be made to a man, and to his mother, or to a man and to his sister or his aunt, in these cases, although the gift is made to a man and a woman, yet they have several inheritances, because they cannot marry together.

1 Inst. 182 b.

§ 47. Lord *Coke* says, that, in these cases, there is no division between the estates for life and the several inheritances : for, in this case, they cannot convey away

away the inheritance after their decease, for it is divided only in supposition and consideration of law, and to some purposes the inheritance is said to be executed.

§ 49. In consequence of the right of survivorship among joint-tenants, all charges made by a joint-tenant on the estate, determine at his death, and do not affect the survivor: for it is a maxim of law, that *jus accrescendi prefertur oneribus*.

Joint-tenants cannot charge their Estates.

1 Inst. 185 a.

§ 50. Thus, *Littleton* says, if there are two joint-tenants in fee, and one of them grants a rent-charge by deed out of that which belongs to him, in this case, during the life of the grantor, the rent-charge is effectual: but, after his decease, the rent-charge is void; for he who hath the land by survivorship, shall hold it discharged; because he is in by survivorship, and claims under the original feoffment, and not by descent from his companion.

f. 286.

§ 51. If one joint-tenant acknowledges a recognizance or a statute, or suffers a judgment in an action of debt, and dies before execution had, it shall not be executed afterwards. But, if execution be sued in the life of the cognizor, it shall bind the survivor. And Lord *Coke* observes that, as well in the case of a rent-charge as of a recognizance, statute, or judgment; if he who makes the charge survives, it is good for ever.

1 Inst. 184 b.

§ 52. If one joint-tenant in fee-simple be indebted to the king and dies, no extent shall be made after his decease upon the land in the hands of the survivor.

1 Inst. 185 a.

Id.

§ 53. There is one exception to this rule: for, if there are two joint-tenants in fee, and one of them makes a lease to a stranger for years, it will be good against the survivor, even though such lease does not commence until after the death of the joint-tenant who made it; because it is an immediate disposition of the land. It is the same, where the lessor is joint-tenant for life or for years.

Vide Tit. 32.

No Dower
of a Joint-
tenancy.

Lit. f. 45.
1 Inst. 37 b.

§ 54. The widow of a joint-tenant in fee or in tail, is not entitled to dower; because, upon the death of one of the joint-tenants, the estate goes to the survivor, who is then in from the first feoffor or donor, and may plead it as an original feoffment or gift to himself, without naming his companion.

Nor Curtesy.

1 Inst. 183 a.
30 a.

§ 55. It was formerly held, that where lands were given to two women, and the heirs of their two bodies begotten, the husband of one of them having issue should be tenant by the curtesy; living the other sister, the inheritance being executed. But Lord Coke observes, that *Littleton* has cleared up this doubt, by shewing, that the inheritance is not executed, and, therefore, the husband cannot be entitled to an estate by curtesy.

In what Acts
they must
join.

1 Inst. 67 b.

§ 56. In consequence of the intimate union of interest and possession which exists between joint-tenants, they are obliged to join in many acts. Thus, joint-tenants must formerly have all done homage and fealty together. There are, however, many cases, in which they need not all join, and where the act of one will be

be considered as the act of all. Thus, the entry of one joint-tenant is deemed the entry of all; and the seisin and possession of one is the seisin and possession of all. 6 Mod. 44.

§ 57. It is a rule, that every act, done by one joint-tenant for the benefit of himself and his companion, shall bind the other joint-tenant. But no injurious act of one joint-tenant alone shall prejudice his companion. Bridg. Rep. 129.

Thus, livery of seisin, made to one joint-tenant, enures to both of them; and the entry or re-entry of one joint-tenant is as effectual in law, as if it were the act of both. 1 Inst. 49 b. Idem: 319 a. 364 a. and b.

So, where joint-tenants make a lease, and the lessee surrenders to one of them, this shall enure to them both, because they have a joint reversion.

§ 58. If there are two joint-tenants for life or years, and one of them commits waste, this is deemed waste by them both, as to the place wasted. But treble damages shall be recovered only against the person who actually committed the waste.

§ 59. It has been stated, that, in consequence of the unity of possession, which exists between joint-tenants, the possession of the one is the possession of the other, and the entry of the one is the entry of the other; and a joint-tenant can never be actually disseised by his companion, but by an actual ouster. So that, if one The Possession of one, is that of the other. 6 Mod. 44. 1 Salk. 285. Hob. 120.

joint-tenant levy a fine of the whole, it will not amount to an ouster of his companion.

§ 60. Joint-tenants, being seised *per my et per tout*, must jointly implead, and be impleaded. And if a joint-tenant refuses to join in an action, he may be summoned and severed.

Remedies
against each
other.

1 Inst. 200 b.

§ 61. By the common law, joint-tenants had no remedy against each other, where one alone had received the whole profits of the estate: for he could not be charged as bailiff or receiver to his companion, unless he actually made him so. But now, by the statute 4 and 5 Ann, c. 16. § 27. actions of account are maintainable by one joint-tenant, his executors or administrators, against the other as bailiff, for receiving more than his share.

2 Inst. 403.

§ 62. By the statute of *Westminster* the second, c. 22. one joint-tenant may have an action by writ of waste against his companion. But Lord *Coke* observes, that this act does not extend to castles, houses, or other places for the habitation of man; for one joint-tenant might have had, for reparation of them, a writ *de reparatione facienda*, at common law.

TITLE XVIII.

JOINT-TENANCY.

CHAP. II.

By what Means a Joint-tenancy may be severed and destroyed:

- | | |
|---|---|
| § 2. <i>Destruction of the Unity of Interest.</i> | 20. <i>Alienation of one Joint-tenant to another.</i> |
| 8. <i>Destruction of the Unity of Title.</i> | 27. <i>Disuniting the Possession.</i> |
| 19. <i>A Devise does not sever a Joint-tenancy.</i> | 28. <i>Partition at Law.</i> |
| | 38. <i>Partition in Equity.</i> |
| | 43. <i>Agreement to make Partition.</i> |

Section 1.

AN estate in joint-tenancy may be severed and destroyed, by destroying any of its constituent unities, except that of time; which, as it respects only the original commencement of the estate, cannot be affected by any subsequent transaction.

§ 2. An estate in joint-tenancy will be destroyed by destroying the unity of interest, which may be done either by the act of one of the parties, or by the operation of law.

Destruction
of the Unity
of Interest.
1 Inst. 122 b.

§ 3. A tenant for life, remainder to B. and three others for life, the reversion to C. and his heirs expectant. C. levied a fine to A. and B., to the use of A.

Wiscot's case,
2 Rep. 60.

for life, and, after his death, to the use of *B.* in fee. *A.* died, and, afterwards, *B.* died: and, whether the jointure was severed or not, was the question. And it was resolved that the jointure was severed; and this difference taken, when the fee is limited by one and the same conveyance, there one person may have a fee-simple, and the other an estate for life, jointly. But, when they are first tenants for life, and, afterwards, one of them acquires the fee-simple, there the jointure is severed. As, if a man makes an estate to three, and to the heirs of one of them, there one of them hath fee-simple, and yet the jointure continues: for all is but one entire estate, created at one and the same time, and, therefore, the fee-simple cannot merge the jointure, which took effect with the creation of the remainder in fee. But, when three are joint-tenants for life, and afterwards one purchase the fee, there the fee-simple merges the estate for life: for the estate for life was *in esse* before, and might be merged or surrendered, and so cannot the estate for life in the first case. But, in the same case, that is to say, when an estate is made to three, and to the heirs of one of them, and he who hath the fee dies, and one of the survivors purchases the remainder, the jointure is severed *causâ quâ supra*; and, when one tenant for life purchases the reversion in fee, if the jointure should remain, he would have a reversion in fee, and an estate for life also in part, which reversion in fee he might grant over, and his estate for life would remain in part, which would be absurd, and against reason: for, in the first case, when an estate is made to three, and to the heirs of one, he who hath the fee cannot grant over
his

his remainder, and continue in himself an estate for life. Vide ch. i. f.

§ 4. So, Lord *Coke* says, if a lease be made to two men for term of their lives, and, after the lessor granteth the reversion to them two, and to the heirs of their two bodies, the jointure is severed. 1 Inst. 182 b.

§ 5. Where the reversion in fee descends to one of the persons, who is joint-tenant for life, the joint-tenancy will thereby be severed.

§ 6. A man, having issue three sons, devised lands to his two youngest sons jointly for their lives. Afterwards, the eldest son, who had the reversion in fee, died, by which it descended to the second son. This was held to be a severance and destruction of the jointure by operation of law. 2 And. 202.

§ 7. If there be two joint-tenants, and the crown descends on one of them, the jointure is severed; because the king becomes immediately seised in his political capacity *jure coronæ*; which is a different kind of interest from that of the other joint-tenant.

§ 8. An estate in joint-tenancy may also be destroyed by destroying the unity of title. Thus, if one of the joint-tenants conveys his share to a stranger, it is a severance of the joint-tenancy: for the grantee and the remaining tenant hold by several titles; for the alienee comes in by the conveyance of one of the joint-tenants, Destruction of the Unity of Title.
Lit. f. 292.
and

and the other joint-tenant hath the other moiety by the first feoffment.

Tit. 32.

§ 9. Alienations of this kind, however, must be valid and good in law to have this effect; and, therefore, a conveyance by a joint-tenant to his wife, being void in law, will not operate as a severance of the joint-tenancy.

Moyse v. Giles,
Pres. in Ch.
124.

§ 10. A joint-tenant of a church lease, being taken ill on a journey, and, wishing to sever the joint-tenancy, that he might provide for his wife, sent for the schoolmaster of the town, and directed him to prepare an instrument for that purpose. The schoolmaster drew a kind of deed of gift of the lease from the sick man to his wife, which he executed and died.

The deed being void in law, the widow endeavoured to establish it in equity, but was dismissed; it being voluntary, and without consideration.

2 Vern. 63.

§ 11. It is said in *Vernon*, that if a joint-tenant agrees to alien, and does it not, but dies, it would be a strange decree to compel the survivor to perform the agreement.

2 Vef. 634.

Lord *Hardwicke*, observing on this passage, says, “If the articles were such as amounted to a severance in equity, in such case, this court would decree against the survivor.” And, in a modern case, Lord *Loughborough* said, “A covenant by a joint-

2 Vef. jun.
257.

“tenant

“nant to fell, though it does not sever the joint-
 “tenancy at law, will, in equity. I have always un-
 “derstood this as a settled point, and have no difficulty
 “upon it.”

§ 12. Articles of agreement by an infant, though in consideration of marriage, will not operate as a severance of a joint-tenancy.

§ 13. *Ann May*, previous to her marriage, and being then an infant, and possessed of a considerable leasehold estate jointly with her sister in joint-tenancy, by articles of agreement, made between her of the first part, *John Hook*, her intended husband, of the second part, and trustees of the third part, covenanted and agreed that the leasehold estates should be assigned to *John Hook* for his own use and benefit. The marriage took effect; and *Ann May* died under age.

May v. Hook,
 1 Inst. 246 a.
 n. 1.
 1 Bro. Rep.
 112.

The question was, whether these articles were in equity a severance of the joint-tenancy.

Lord Chancellor *Bathurst* observed, that the first point attempted to be established by the counsel was, that had *Ann May* been of full age when she entered into the articles, they would have amounted to a severance; but that no determination to that effect had ever been made. That the co-joint-tenants were not in this case to be considered as volunteers, as they claimed by the title paramount; and that their situation approached nearer to that of issue in tail, who claimed *per formam doni*, than to that of an heir

at

at law, who claims only] under his ancestor. That the utmost which the infant could do, would be an avoidable act; and that of course it would be in the discretion of the court either to give or refuse their assistance to it; and, by a parity of reason, it must always be in their power to model his contracts at their pleasure. That the contract in the present case was not such as the court would uphold. Had the infant lived to come of age, and a bill been filed against her for the performance of the articles, the court would have set them aside, and referred it to a master to draw new proposals for a proper settlement. That as the contract was not such as would have bound the infant herself, *a fortiori* it should not bind the co-joint-tenant. That it would be a strange doctrine that any act of an infant, which is by its nature avoidable, should sever the joint-tenancy; as, if that were allowed, it would always be in the power of the infant to say, whether the joint-tenancy should be severed or not. Then, if any of the co-joint-tenants should die under age, the infant might avoid his own act, by pleading *infra ætatem*, and resort to his title by survivorship; which would be of great injustice and hardship on the co-joint-tenants. On these grounds, his Lordship was of opinion, that the articles did not amount in equity to a severance of the joint-tenancy.

Clerk v.
Turner,
2 Vern. 323.

£ 302.

§ 14. It has been stated, that a lease for years, made by one joint-tenant, will bind his companion; so that it operates as a severance *pro tanto*. But *Littleton* says, that if there are two joint-tenants in fee, and one of them makes a lease for life to a stranger, the joint-tenancy

tenancy of the freehold is severed : and Lord Coke says, 1 Inst. 191 b. that it is also a severance of the reversion.

§ 15. So, if two persons are joint-tenants of a lease for 21 years, and one of them lets his share for certain years, part of the term, the joint-tenancy is severed. Idem. 192 a. 2 Vern. 323.

§ 16. A mortgage by a joint-tenant of a term for years, will operate as a severance of the joint-tenancy.

§ 17. Three persons, being jointly interested in the trust of a term for years, one of them mortgaged his third part ; and the question was, whether the joint-tenancy was severed. York v. Stone, 1 Ab. Eq. 293.

Lord Cowper held, that this was a severance : for in the case of a joint-tenancy, which was a thing odious in equity, it would be a disadvantage to the mortgagor not to have it construed a severance.

§ 18. Regularly, every disposition by one joint-tenant, in order to bind his companion, must be an immediate disposition. For, the severing joint-tenant claiming the whole under the original feoffment or grant, the whole must descend to him, unless his companion has disposed of it in his life-time.

§ 19. From this principle, it follows, that a devise can in no case operate as a severance of a joint-tenancy : it being a maxim of law, that *jus accrescendi præfertur ultimæ voluntati*. A Devise does not sever a Joint-tenancy Lit. f. 287. 1 Inst. 185 b.

§ 20. An

Alienation of
one Joint-
tenant to
another.

Tit. 32.

§ 20. An estate in joint-tenancy may also be destroyed by the alienation of one joint-tenant to another; and the proper conveyance in this case is a release: for one joint-tenant cannot enfeoff his companion, because they are both actually seised of the estate.

1 Inst. 273 b.

§ 21. Thus, if there be two joint-tenants in fee, and one of them release to the other, this will destroy the joint-tenancy, and vest the whole estate in the releasee, who will then hold in severalty; and the releasee shall, for many purposes, be adjudged in from the first feoffor.

Lit. f. 304.

§ 22. If there are three joint-tenants, and one of them releases by deed to one of his companions all the right which he hath in the land, the releasee has a third part of the land with himself and his companion in common; and he and his companion shall hold the remaining two parts in joint-tenancy.

Bro. Ab.
Joint-tenant,
pl. 2.

§ 23. But, if one joint tenant releases to all the others, they are in from the first feoffor or grantor, and not from him who released: and they continue to hold in joint-tenancy.

1 Inst. 185 a.

§ 24. If one joint-tenant grants a rent out of his part, and afterwards releases to his companion, and dies, the companion shall hold the land charged with this rent; because he comes to the estate by his own act, namely, by acceptance of the release, and not by survivorship. And in Lord *Abergavenny's* case it was resolved, that if two joint-tenants be in fee, and one

6 Rep. 79 a.

grants a rent-charge in fee, and afterwards releases to the other; in that case, although to some intent he, to whom the release is made, is *in* by the first feoffor, and no degree is made between them, yet, as to the grantee of the rent-charge, he is *in* under the first joint-tenant, who released; and, by acceptance of the release, he has deprived himself of the ways and means to avoid the charge: for the right of survivorship was the sole means to have avoided it, and that right is utterly taken away by the release.

§ 25. If there are three joint-tenants, and one grants, sells, bargains, assigns, sets over, and confirms to one of the others all his right, title, interest, claim, demand, and estate of and to the lands held in jointure, this is sufficient to pass the *purparty*: and though the jury found *quod concessit*, yet the court will adjudge *quod relaxavit*.

Chester v.
Willan,
2 Saund. 96.

§ 26. *John Stile* and *Susan* a feme sole were joint-tenants for life. *Susan* took husband, who, by fine, granted to *Stile*, *tenementa prædicta, et totum, et quicquid habent, pro termino vitæ* of the said *Susan*, *et illa ei reddidit, habendum* to him and his assigns for the life of the said *Susan*, and warranted it to him and his heirs during the life of the said *Susan*.

Eustace v.
Scawen,
Cro. Ja. 696.

The question was, whether this grant should enure by way of release, or by grant of the estate, and severance of the jointure of the moiety; so that this estate should enure during the life of *Susan*.

It was resolved, that it should enure by way of release, and not to grant the estate; and, although it were granted by fine, it as well enured by way of release, as a grant by deed; and the rather, for the words *ei reddidit*, which enured by way of release; and both estates vested in *John Stile*, the law shall vest it in him as if he had it from the feoffor. And, although it was objected, that he had one estate from the feoffor by deed, and the other by the fine, so being by matter of record he could not divide it; yet it was said, that both estates being vested in him, the law shall adjudge it in him, as by the first limitation.

Doderige held, that by whatsoever means he comes to the estate of his companion, it shall enure by way of release; and that he shall be said in of the entire estate, as by the feoffment. And, therefore, if one joint-tenant bargained and sold, by deed inrolled, to his companion, although that vested the use, and the statute vested the possession, yet being in him, the law would construe it to be entirely in him, and not by division of estate.

Tit. 32.

Disuniting
the Posses-
sion.

§ 27. The last mode of destroying an estate is, by disuniting the possession: for, joint-tenants being seised *per my et per tout*, every thing that tends to narrow that interest, so that they shall not be seised throughout the whole, and throughout every part, is a severance or destruction of the jointure.

Partition at
Law.
Lit. f. 290.

§ 28. By the common law, joint-tenants might make a partition of the estate by deed; but one of them could
not

not compel the other to make partition, except by the custom of some cities and boroughs. But now, by the statute 31 Hen. 8. c. 1. reciting the inconveniences which joint-tenants lay under, from one joint-tenant's occupying the whole land or receiving the whole profits, it is enacted, sect. 2. that all joint-tenants of any estate or estates of their own inheritance in their own rights, or in the right of their wives, of any manors, lands, tenements, or hereditaments, shall and may be coerced and compelled to make partition between them of all such manors, lands, tenements, and hereditaments, as they hold as joint-tenants, by writ *de partitione facienda* in that case to be devised in Chancery.

§ 29. As this statute only extended to joint-tenants, having an estate of inheritance, an act was made 32 Hen. 8. c. 32. by which joint-tenants for life or years are enabled to make partition of their estates.

§ 30. It hath been holden, that a general writ by joint-tenants, grounded on this statute, and concluding *contra formam statuti*, is sufficient, without reciting the case particularly, so as to bring it within the statute: for the framing of the writ is left to the clerks in Chancery, and must be according to the form which they have devised.

Cro. Eliz.
743.
Moor v.
Onslow,
Cro. Eliz.
759.

§ 31. In this action there are two judgments: the first, *Quod partitio fiat inter partes prædictas de tenementis prædictis, cum pertinentiis*. And, upon this, there goes out a judicial writ to the sheriff to make partition; which recites, first, the writ of partition and

Booth's Real
Act. 244.
Lit. f. 248.

judgment, and then commands the sheriff, together with twelve men of the vicinage, &c. to go in person to the lands to be divided, and there, in presence of the parties, (if they appear on summons to be made), by the oaths of those twelve men, to make an equal and fair partition, and allot to each party their full and just share, and then return the inquisition of the partition, annexed to the writ, under the seals of the sheriffs and the jurors, whose names are likewise to be returned.

1 Inst. 169 a.

§ 32. When the inquisition is thus returned, upon motion made to the court, the second judgment is given in this manner: *Ideo consideratum est per curiam, quod partitio firma et stabilis in perpetuum teneatur.*

Berkeley v.
Warwick,
Cro. Eliz.
635.

§ 33. In a writ of partition, if the judgement be given *quod partitio fiat*, and thereupon a writ is directed to the sheriff to make partition, no writ of error lies; for the judgment is not complete till the sheriff's return, and the second judgment, which the law requires hereupon, *quod partitio fiat*, &c.: for, before that, the plaintiff may be nonsuit; or he may, upon the return of the sheriff, suggest to the court that the partition is not equal, and so have a new partition; and may also release before the last judgment.

Cro. Eliz.
636.
Dakson, 59.

§ 34. If, after the awarding of the judicial writ, and before the return of it, the defendant dies, yet the partition is good, and the writ shall not abate; because, before the death of the defendant, judgment should be given that partition shall be made: and

though, upon the return of the judicial writ, there is another judgment given, yet that is given in confirmation of the first judgment. It seems, likewise, that, upon the return of the judicial writ, no exception can be taken to it; therefore, it is not material, whether the defendant be dead or alive, since he can have no advantage by any plea on the return of the writ.

§ 35. If the writ be brought by one joint-tenant against several, and there happen to be error in the execution of it, and one of the defendants release all errors to the plaintiff, this shall not bar the others; for each, having a distinct interest, shall not be prejudiced by the release of his companion.

Yate v. Windham, Cro. Eliz. 64.

§ 36. In this writ of partition may be demanded the view of frank-pledge, together with a manor: for, though it be not severable of itself, nor partible, yet the profits thereof may be divided; or, it may be divided thus, that the one shall have it at one time, and the other at another: also, being demanded within the manor, it may well be entirely allotted to one, and the land in recompence to another.

Moor v. Onslow, Cro. Eliz. 759.

§ 37. By the statute 8 and 9 *Wm. 3. c. 31.* made perpetual by statute 3 and 4 *Ann. c. 18. f. 2.* reciting, that the proceedings on writs of partition were found to be tedious, chargeable, and oftentimes ineffectual, by reason of the difficulty of discovering the persons and estates of the tenants of the manors, &c. to be divided, and the defective or dilatory executing and returning of the process of summons, attachment, and distress,

and other impediments in making and establishing partitions, by reason of which, divers persons, having undivided parts or purparts, are greatly oppressed and prejudiced, and the premises are frequently wasted and destroyed, or lie uncultivated or unmanured, so that the profits of the same are totally or in a great measure lost; for remedy whereof, it is enacted, “ That, after
 “ process of *pone*, or attachment returned upon a writ
 “ of partition, affidavit being made of due notice given
 “ of the said writ of partition to the tenant or tenants
 “ to the action, and a copy thereof left with the occupier or tenant or tenants, or, if they cannot be found,
 “ to the wife, son, or daughter of the tenant or tenants, or to the tenant in actual possession, by virtue
 “ of any estate of freehold, or for term of years, or
 “ uncertain interest, or at will, of the manors, &c.
 “ whereof the partition is demanded, (unless the said
 “ tenant in possession be the demandant in the action),
 “ at least 40 days before the day of return of the said
 “ *pone* or attachment, if the tenant or tenants of such
 “ writ, or any of them, or the true tenant to the messuages, &c. shall not in such case, within 15 days
 “ after the return of such writ of *pone* or attachment,
 “ cause an appearance to be entered in such court,
 “ where such writ of *pone* or attachment shall be returnable, then, in default of such appearance, the
 “ demandant having entered his declaration, the court
 “ may proceed to examine the defendant’s title and
 “ quantity of his part and purpart; and, accordingly
 “ as they shall find his right, part, and purpart to be,
 “ they shall for so much give judgment by default,
 “ and award a writ to make partition, whereby such
 “ proportion,

“ proportion, part, and purpart, may be set out sever-
“ rally ; which writ being executed after eight days
“ notice given to the occupier, or tenant and tenants
“ of the premises, and returned, and thereupon final
“ judgment entered, the same shall be good, and con-
“ clude all persons whatsoever, after notice as aforesaid,
“ whatever right or title they have, or may at any time
“ claim to have in any of the manors, &c. mentioned
“ in the said judgment and writ of partition, although
“ all persons concerned are not named in any of the
“ proceedings, nor the title of the tenants truly set
“ forth.” Provided, that if such tenant or person
concerned shall, within one year after the first judgment
entered, or in case of infancy, coverture, non-sane me-
mory, or absence out of the kingdom, within one year
after their return, or the determination of such in-
ability, apply to the court by motion, and shew a good
and probable matter in bar of such partition, or that
the demandant hath not title to so much as he hath
recovered, the court may suspend or set aside such judg-
ment, and admit the tenant to appear and plead ; and
if the court, upon hearing thereof, shall adjudge for
the first demandant, the first judgment shall stand con-
firmed against all persons, except such other persons as
shall be absent or disabled ; and the person so appealing,
shall be awarded to pay costs. Or, if within such time
aforesaid, the tenants or persons concerned, admitting
the demandant's title and purpart, shall shew to the
court any inequality in the partition, the court may
award a new partition to be made in presence of all
parties, if they will appear ; which second partition,
returned and filed, shall be good against all persons,

Halton v.
E. of Thanet,
7 it. 20.

except as before. And that no plea in abatement shall be received in any suit for partition, nor shall the same be abated by the death of any tenant.

Partition in
Equity.

Mitford's
Plead. 109.
Fonb. Treat.
of Eq. b. 1.
c. 1. f. 3.
1 *Inst.* 169 a.
n. 2.

§ 38. The courts of common law are now seldom resorted to for obtaining a partition of estates; for the courts of equity, ever since the reign of Queen *Elizabeth*, have entertained suits for a partition. And the ground upon which they first interfered seems to be, that if the titles of the parties are in any degree complicated, it is extremely difficult to proceed in the courts of common law; and, where the tenants in possession are seised of particular estates only, the persons entitled in remainder cannot be bound by the judgment in a writ of partition.

Parker v.
Gerard,
Amb. 236.
Warner v.
Baynes,
Id. 589.

§ 39. A joint-tenant may, therefore, file a bill in the Court of Chancery, praying for a partition of the estate; in which case, the court will issue a commission to certain persons for that purpose, who proceed to divide the estate without a jury, and make their return to the court; and, if not objected to by any of the parties, the court will make a decree to confirm such partition: and such bill is now held to be a matter of right, and each party must be at equal expence, though their interests be ever so unequal.

Cartwright v.
Pulteney,
2 *Atk.* 380.

§ 40. Lord *Hardwicke* has said, that where a bill is brought in the Court of Chancery, to have a partition between two joint-tenants, or tenants in common, the plaintiff must shew a title to himself in a moiety, and not allege generally, that he is in possession of a moiety: and

and this is stricter than a partition at law, where seisin is sufficient. In Chancery, the reason is, because conveyances are directed, and not a partition only; which makes it discretionary whether, where a plaintiff has a legal title, they will grant a partition or not: and, where there are suspicious circumstances in the plaintiff's title, the court will leave him to law.

§ 41. An agreement by the husbands of two joint-tenants to make a partition, and a partition made under such agreement, will not bind the inheritance of the wives.

Agreement
to make
Partition.

§ 42. *Mary and Susan Jackson*, being joint-tenants in fee of certain copyhold lands, *Mary* intermarried with *Ingram*, and *Susan* with *Little*. The husbands, by a mutual agreement, made a partition of the premises between themselves and the heirs of *Mary* and *Susan*, by which each of them agreed to take one part thereof, which each of them did, and entered into possession; and *Susan* held a share of the premises so divided by virtue of such partition, and *Mary* enjoyed her part till her death; and, *Mary's* share being at the time of the partition somewhat larger than *Susan's*, in consideration thereof, *Mary* paid the taxes charged upon both.

*Ireland v.
Rittle,
1 Atk. 541.*

The bill was brought by the heir of *Mary* to confirm the division, and that the defendant *Susan* might be restrained from proceeding at law against the plaintiff, to compel a new partition thereof.

Lord *Hardwicke* said, that where there had been a long possession under an agreement for owelty of partition, the court was strongly inclined to quiet the enjoyment of such estates, and he was at first of opinion to establish the agreement. But it appeared that it was only an agreement between the husbands, which could by no means bind the inheritance of the two wives; for the argument of long enjoyment, was of no force, unless it had been originally the agreement of the wives.

Vide Tit. 19
and 20.

His Lordship further observed, that if a joint-tenant upon a partition thinks proper to accept of a contingent uncertain advantage, where one moiety of the land is of superior value to the other, it will not vacate the agreement.

2 Comm. 185.
2 Bro. Rep.
224.

§ 43. Sir *William Blackstone* says, if two joint-tenants agree to part their lands and hold them in severalty, they are no longer joint-tenants; for they have now no joint interest in the whole, but only a several interest respectively in the several parts: and, for that reason also, the right of survivorship is by such separation destroyed. It should, however, be observed, that such an agreement would only operate in equity, until an actual partition was made in pursuance of it.

Ante.

TITLE XIX.

COPARCENARY.

- | | |
|--|---|
| § 1. <i>How this Estate arises.</i>
3. <i>Properties of Coparceners.</i>
6. <i>They have several Freeholds.</i>
7. <i>The Possession of one is that of the other.</i>
10. <i>Subject to Curtesy and Dower.</i> | 11. <i>How dissolved.</i>
12. <i>Voluntary Partition.</i>
19. <i>Partition by Writ.</i>
24. <i>Partition in Equity.</i>
31. <i>Incidents after Partition.</i> |
|--|---|

Section. 1.

AN estate in coparcenary arises, where a person, seised of an estate of inheritance, dies, leaving only daughters, sisters, aunts, or other female heirs, in which case, the estate descends to such daughters, sisters, &c. jointly; and they are called *Coparceners*, and are said to hold in coparcenary, and to make but one heir to their ancestor.

How this estate arises.
Lit. f. 241, 242.

§ 2. An estate in coparcenary, also, frequently arises in consequence of customary descents to all the children; in which case, they are coparceners: and from which, *Littleton* says, that coparceners may be either by common law, or by custom.

§ 3. The properties of coparceners are, in some respects, like those of joint-tenants; for they have the same

Properties of Coparceners.

1 Inst. 163 b.
164 a. 169 a.

same unities of interest, title, and possession. As they make but one heir, they have one entire freehold in the land, in respect of a stranger's *præcipe*.

§ 4. In many other points, coparceners differ materially from joint-tenants.

f. 254.

3 Comm. 188.

Coparceners always claim by descent, whereas joint-tenants always claim by purchase: for *Littleton* says, if sisters purchase lands or tenements, they are joint-tenants thereof, and not coparceners. And hence it likewise follows, that no lands can be held in coparcenary, but estates of inheritance, which are of a descendible nature; whereas, not only estates in fee and in tail, but for life or years, may be held in joint-tenancy.

1 Inst. 164 a.

§ 5. There is no unity of time necessary to an estate in coparcenary: for, if a man hath two daughters, to whom his estate descends in coparcenary, and one dies before the other, the surviving daughter, or, when both are dead, their two heirs, are still coparceners; the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title.

They have
several Free-
holds.

1 Inst. 164 a.

3 Comm. 188.

§ 6. Coparceners, though they have an unity, have not an entirety of interest; for, between themselves, to many purposes they have, in judgment of law, several freeholds: and Sir *William Blackstone* says, they are properly entitled each to the whole of a distinct moiety,

moiety, and, of course, there is no *jus accrescendi* or survivorship between them; for each part descends severally to their respective heirs, though the unity of possession continues.

§ 7. The possession of one coparcener is the possession of the other; and the entry of one coparcener, generally, shall be accounted in law the entry of them both; and no divesting of the moiety of the sister. But, where one coparcener enters specially, claiming the whole land, and taking the whole profits, she gains one moiety, namely that of her sister, by abatement; and yet her dying seised shall not take away the entry of her sister. But, in a note to this passage, taken from Lord *Nottingham's* manuscripts, it is said; “The contrary is held, that one coparcener cannot be dis-
“ seised, without actual ouster; and claim shall not
“ alter the possession.” And the case of *Small v. Dale*, *Hob.* 120. which will be stated in Title 29, is cited.

The Possession of one is that of the other.

1 Inst. 243 b.
n. 1. 373 b.

§ 8. If one coparcener enters, claiming the whole, and makes a feoffment in fee, and takes back an estate to her and her heirs, and hath issue, and dies seised, this descent shall take away the entry of the other sister: because, by the feoffment, the priority of the coparcenary was destroyed. But, where both coparceners enter, the taking of the whole profits, or any claim made by the one, cannot put the other out of possession.

Idem. and 373 b.

§ 9. In a writ of error from the Court of King's Bench, the case was, that *Maurice Tyrrell*, being a Roman

Davenport v. Tyrrell, 1 Bl. Rep. 675.

Roman catholic, died seised of certain lands, leaving two sons, *Richard* and *James*. By the *Irish* statute, 2 *Anne*, estates in fee-simple, or fee-tail, belonging to Roman catholics, descended in gavelkind ; but, on the death of *Maurice*, his eldest son *Richard* entered alone, and held the same until his death, for 62 years, and, in the meantime, settled the same by fine and recovery, to which *James* his brother was privy. On the death of *Richard*, in 1766, leaving two daughters, *James* the lessor of the plaintiff, brought an ejectment against his two nieces, for two-thirds of the moiety of the lands, whereof his brother died seised, as coheir in gavelkind with his brother. He then brought an ejectment against the widow of *Richard* for the other third of the moiety, which she claimed as her dower, and also under the settlement.

On the trial, the judge directed the jury to find a verdict for the plaintiff ; upon which a bill of exceptions was tendered, setting out in substance this case, which was returned into the King's Bench in *Ireland*, and thereupon the court gave judgment for the defendant. A writ of error was then brought in the King's Bench at *Westminster*, and it was argued for the defendant, that 62 years sole possession and the fine were a bar to this action by common law : that this was a question not between joint-tenants, or tenants in common, but tenants in gavelkind, who were coparceners : that the true state of the case was this, 1, If both enter, there must be an actual ouster, to make a disseisin ; 2, If one enters generally, and takes the profits, this is no disseisin ; 3, If one enters *specially*, as in the present case,

case, claiming right to the whole, and taking the whole profits, this is a disseisin; but after her death, the sister may enter, unless barred by the statute of limitations; 4, If, after a special entry, one by feoffment or fine destroys the coparcenary, and takes back an estate in fee and dies, the entry of the sister is barred. Here, *Richard* entered alone in 1704, took the whole profits, settled the estate in 1727, with the privity of *James*, levied a fine, and died after 62 years possession. The entry of *James* is therefore clearly barred, and he cannot maintain an ejectment. The court said, that the statute 2 *Anne* made the lands of Roman catholics descend in gavelkind; that was its whole effect: and then the adverse possession of one gavelkind tenant would not operate as the possession of both. That was a qualified rule; and, in the present case, the acts of ownership, fine, &c. made an actual ouster, the statute of limitations operated as an extinguishment of the remedy of the one, and not as giving the estate to the other.

Coppinger v. Keating, Infra, Tit. 20.

§ 10. Curtesy and dower are incident to estates held in coparcenary; for there no survivorship takes place, as each share descends to the heirs of the respective parcener. But, in such case, dower can only be assigned in common; for the widow cannot have it in a different manner from her husband.

Subject to Curtesy and Dower.

§ 11. Estates in coparcenary may be dissolved by partition, which disunites the possession; by the alienation of one coparcener, which disunites the title, and may disunite the interest; and by the whole at last descending

How dissolved.

descending to and vesting in one single person, which brings it to an estate in severalty.

Voluntary
Partition.
Lit. f. 243.

§ 12. Partitions are either voluntary or compulsory. *Littleton* mentions four sorts of voluntary partitions :— The first is, when coparceners agree to make partition, and do make partition, of the tenements, and that each shall have a particular part.

† Inst. 166 a.

§ 13. Lord *Coke* observes upon this section, that if coparceners make partition at full age, and unmarried, and of sane memory, of lands in fee-simple, it is good and firm for ever, albeit the values be unequal ; but, if it be of lands entailed, or if any of the parceners be of nonsane memory, it shall bind the parties themselves, but not their issues, unless it be equal ; or, if any be covert, it shall bind the husband, but not the wife or her heirs ; or, if any be within age, it shall not bind the infant.

Lit. f. 244.

§ 14. The second mode of partition is, where the coparceners agree to choose some friend to divide the lands ; and, in that case, the eldest daughter shall chuse first, and the other daughters according to their seniority.

Lit. f. 245.

§ 15. The part which the eldest takes by virtue of her priority of age, is called *enitia pars*. It is a respect paid to age, and merely honorary, for it does not descend to her issue, but the next eldest sister shall have it ; whereas, all those privileges which the law gives to
the

the eldest sister, that are beneficial to her, descend to her issue, and even to her assignee.

§ 16. The third mode of partition is, where the eldest makes the division of the lands; in which case she shall choose last: for, Lord *Coke* says, the rule of law is, *cujus est divisio, alterius est electio*, for avoiding of partiality. Idem.

§ 17. The fourth mode of partition is, to have the lands divided, and then the sisters to draw lots for their shares; and, Lord *Coke* observes, that, in this kind of partition, coparceners *fortunam faciunt judicem*. Lit. f. 246.

§ 18. Lord *Coke* also observes, that there are other partitions in deed, beside those here mentioned: for a partition between two coparceners, that the one shall have and occupy the land from *Easter* until the first of *August* in feveralty, and the other shall have and occupy the land from the first of *August* till *Easter*, yearly to them and their heirs, is a good partition: Also, if two coparceners have two manors by descent, and they make partition, that the one shall have the one manor for one year, and the other, the other manor for that year, and so *alternis vicibus* to them and their heirs, this is a good partition. The same law is, if a partition be made for two or more years, and each coparcener has an estate of inheritance and no chattel, albeit either of them *alternis vicibus* has the occupation, but for a certain term of years. 1 Inst. 167.

§ 19. Where

Partition by
Writ.

Lit. f. 248.

§ 19. Where coparceners cannot agree upon any of the preceding modes of partition, any one or more of them may, by the common law, bring a writ of partition against the others; and when judgment is given upon this writ, it is, that partition shall be made between the parties, and that the sheriff in his proper person shall go to the lands and tenements, and by the oaths of twelve lawful men of his bailiwick, shall make partition between the parties; and that one part of the lands shall be assigned to the plaintiff, and another part to another, &c. not making mention in the judgment of the elder sister more than of the younger.

† Inst. 169 a.

§ 20. When the inquisition is returned, upon motion made to the court, the second judgment is given in this manner: *Ideo consideratum est per curiam, quod partitio firma et stabilis in perpetuum teneatur.*

Vide Tit. 18.
Ch. 2. f. 28.

§ 21. The proceedings under a writ of partition are somewhat altered by the statutes 31 Hen. 8. c. 1. and 32 Hen. 8. c. 32. and still more by the statute 8 and 9 Will. 3. c. 18. which facilitates partitions considerably.

† Inst. 175
a. and b.

§ 22. At common law, the writ of partition lay for one coparcener, tenant of the freehold, against the other, and against the alienee of such coparcener: but it lay not for the alienee, nor for the tenant by the curtesy. And, if one coparcener had made a lease for life, she could not afterwards bring a writ of partition, during the continuance of that estate.

§ 23. If there are three coparceners, and the eldest purchases the part of the youngest, yet she shall have a writ of partition at common law against the middle sister; for, though she has one part by purchase, yet this does not strip her of the character of a coparcener. So it is in a stronger case, if there be three coparceners, and the eldest takes husband, and the husband purchases the share of the youngest, the husband is a stranger, and no coparcener; yet he and his wife shall have a writ of partition against the middle sister at the common law, because he is seised of one part in right of his wife, who is a parcener. 1 Inst. 175 a.

§ 24. A tenant by the curtesy shall have a writ of partition upon the statute 32 Hen. 8. for, although he is neither joint-tenant, nor tenant in common, (for that a *præcipe* lieth against the parcener and tenant by the curtesy), yet he is in equal mischief as another tenant for life. 1 Inst. 175 a. and b.

§ 25. It has been stated in Title 1. that, where the demesnes are severed from the manor, this destroys the manor. But, if there be two coparceners of a manor; and, on a partition, the demesnes are allotted to one and the services to the other; in that case, although there is an absolute severance, yet, if one dies without issue, and the demesnes descend to her who hath the services, the manor is revived; because, on the partition, they were in by act of law, the demesnes and services were again united by act of law. 6 Rep. 64 a.

Lit. f. 251,
252.

§ 26. If two houses descend to two coparceners, one worth 20 s. *per annum*, and the other only worth 10 s., each coparcener, upon a partition, shall have a house. But she that has the house worth 20 s. shall pay to the other and her heirs 5 s. *per annum*, that the partition may be equal; and distress may be of common right, into whose hands soever the house comes.

1 Inst. 169 b.

§ 27. This kind of rent is called *a rent for equality or equality of partition*, and might formerly have been granted without deed. And, where a rent of this kind is granted generally, it shall issue out of the grantor's share, and shall go in coparcenary.

1 Inst. 164 b.
165 a.

§ 28. There are some things which cannot be divided between coparceners: such as estovers appendant to a freehold, or common without stint; because a partition of them would enlarge the original grant beyond the intention of the grantor. But the manner of enjoying them among coparceners was usually thus:—They were allotted to the eldest; and the others had an allowance out of the rest of the inheritance. But, where nothing else descended, then it was agreed, that each should have them for a certain time.

2 Roll. Ab.
257.
6 Rep. 64 a.
1 Bac. Ab.
694.

§ 29. It is said in *Roll's Abridgment*, that if coparceners of a manor make partition, each of them shall have a several manor and court baron. But this must be understood of a partition before the statute

quis

quia emptores ; for, though that statute allows of a creation of rent for owelty of partition, yet it will never allow the erection of a new manor, by partition made of an old manor ; since such partitions may be equal, without a new creation.

§ 30. Partitions are now usually made by means of a bill in Chancery, in the same manner as partitions between joint-tenants. And it is said in a modern case, that it was probably in consequence of the statute 31 Hen. 8. c. 1. that the Court of Chancery assumed this jurisdiction.

Partition in Equity.

Vide Tit. 18. Ch. 2. f. 2 Vef. jun. 125.

§ 31. Though the law gives every parcener a power to sever her own moiety, and to carry it to the family into which she marries ; yet, since the partition is compulsory, the law will not put coparceners in a worse condition after partition, than if they had enjoyed their shares without partition. And, therefore, on a suit commenced for any part, or on eviction of any part, after partition, they shall have like remedy, as if they had enjoyed in common ; in which case, if a suit had been commenced, both parties must have been impleaded ; and, on the recovery, there had been an equal loss to both. Therefore, after partition, there is a warranty annexed to each part ; so that if either be impleaded, she may vouch her sister, and, if she loses, she may recover one moiety of her loss in value against the other sister. For there is a condition annexed to the partition, that, if either the whole of any one share, or an estate for life or in tail, be thereout

Incidents after Partition.

1 Inst. 173 b.

evicted, by entry without action, the party so evicted may enter on her sister's moiety, and avoid the partition of an undivided moiety of what is left.

§ 32. In consequence of this principle, it is a rule, that where a person is desirous of selling an estate derived through a partition, he must not only shew his own title, but also the title of the other partitioners.

TITLE XX.

TENANCY IN COMMON.

- | | |
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| § 1. <i>Description of.</i>
3. <i>How created.</i>
9. <i>Incidents to this Estate.</i>
11. <i>The Possession of one is that of the other.</i> | 18. <i>Subject to Curtesy,</i>
20. <i>And to Dower.</i>
21. <i>How dissolved.</i>
22. <i>Partition at Law.</i>
24. <i>Partition in Equity.</i> |
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Section 1.

A TENANCY in common is where two or more persons hold lands or tenements in fee-simple, fee-tail, or for term of life or years, by several titles, and not by a joint title, and occupy lands in common; from which circumstance they are called *tenants in common*.

Description of.

Lit. f. 292.

§ 2. The only unity required between tenants in common is that of possession: for one tenant in common may hold his part in fee-simple, the other in tail or for life; so that there is no unity of interest. One may hold by descent, the other by purchase; or the one by purchase from one person, and the other by purchase from another; so that there is no unity of title. One's estate may have been vested fifty years, the other but yesterday; so that there is no unity of time.

2 Comm. 191

How created.

§ 3. A tenancy in common may be created by the destruction of an estate in joint-tenancy or coparcenary.

L. 292.

Thus, *Littleton* says, if a man enfeoffs two joint-tenants in fee, and one of them enfeoffs a stranger of his share, now the alienee and the other joint-tenant are tenants in common; because they are in by different titles: for the alienee comes to the moiety by the feoffment of one of the joint-tenants, and the other joint-tenant hath the other moiety by force of the first feoffment made to him and his companion.

Lit. f. 309.

§ 4. So, if two persons have an estate in coparcenary, and one of them aliens his share to a stranger, the alienee and the other coparcener become tenants in common.

2 Inst. 182 a.
189 b.

§ 5. It has been stated in Title 18. that where lands are given to two men and the heirs of their bodies, they have a joint estate for their lives, and several inheritances: so that they are joint-tenants for life, and tenants in common of the inheritance in tail.

§ 6. If lands be given to the king and a subject, to hold to them and their heirs, as they cannot be joint-tenants, they are tenants in common. So, likewise, if there are two joint-tenants, and the crown descends on one of them, they become tenants in common.

2 Inst. 190 a.

§ 7. Lord *Coke* says, that if lands be given to *John Bishop of Norwich* and his successors, and to *John Overall*, Doctor of Divinity, and his heirs, being
one

one and the same person, he is tenant in common with himself.

§ 8. A tenancy in common may also be created by express limitation in a deed. Thus, *Littleton* says, if f. 298. lands be given to two persons, to have and to hold *scilicet*, the one moiety to one and his heirs, and the other moiety to the other and his heirs, they are tenants in common. And Lord *Coke*, in his comment on this section says, “And the reason is, because they have “several freeholds, and an occupation *pro indiviso*.”

§ 9. Tenancies in common descend to the heirs of each of the tenants, because they have several freeholds, and not an entirety of interests like joint-tenants: and, therefore, there is no survivorship between them. Incidents to this Estate.

§ 10. Tenants in common are subject to reciprocal actions of waste against each other, by the statute of *Westminster* 2. c. 22. and, by the statute 4 *Ann.* c. 16. § 27. actions of account may be maintained by one tenant in common, his executors and administrators, against the other, as bailiff, for receiving more than comes to his share and proportion; and against the executors or administrators of such tenant in common. 1 Inst. 200 b.

§ 11. The possession and seisin of one tenant in common, is the possession and seisin of the other; because such possession is not adverse to the right of his companion, but in support of their common title: and Lord *Coke* says, that, although one tenant in common take the whole profits, this does not divest the possession of his The Possession of one is that of the other. *Stirling v. Penlington*, *Infra*. 1 Inst. 199 b. Cro. Eliz. 641.

his companion. But, if one tenant in common drives the cattle of his companion off the land, or prevents him from entering upon, and occupying the land, this will divest the possession, so as to entitle the companion to bring an ejectment.

Smales v.
Dale,
Hob. 120.

§ 12. Lord *Hobart* reports it to have been laid down in the Court of Common Pleas, in 12 *Jac.* that the entry of one tenant in common might be in three manners; either in the name of herself or her fellow, or generally, which shall always be taken according to right, as being under construction of law, and, therefore, were construed lawful; or, lastly, entry claiming all expressly, which cannot dispossess her fellow: for her possession is over all lawful, as well before as after such claim; so that there is no possession altered by such claim; and then a sole claim without more, can never change the possession; and, without a change of possession, it remains as before. And, therefore, a coparcener, a joint-tenant, or a tenant in common, can never be disseised by his fellow, but by an actual ouster.

1 Salk. 392.
2 — 423.

Fairclain v.
Shackleton,
5 Burr. 2604.

§ 13. One tenant in common received all the rents for 26 years; and, in an ejectment brought by the other tenant in common, for the recovery of his moiety, the question was, whether this possession of 26 years amounted to an expulsion of the companion, so as to divest his estate? It was said, that tenants in common, as well as joint-tenants and coparceners, have a joint possession, and the possession of one is the possession of both; that the perception of profits does not amount to

to an expulsion. One tenant in common may, indeed, disseise another ; but then it must be done by an actual disseisin, and not by a bare perception of the profits only.

The court were of opinion, that there was no adverse possession, no keeping the plaintiff out of possession. One tenant in common had received the rent, and not accounted for it to the other, but there was no expulsion, no ouster.

§ 14. Notwithstanding the doctrine established in the preceding case, it has since been determined, that 36 years sole and uninterrupted possession by one tenant in common, without any account or demand made, or claim set up by his companion, was a sufficient ground for a jury to presume an actual ouster of the co-tenant,

§ 15. Upon a rule to shew cause why a new trial should not be granted, Lord *Mansfield* reported, that, from the year 1734, one tenant in common had been in the sole possession of the lands, without any claim or demand by any person or persons claiming under the other tenant in common, that no actual ouster was proved : but, upon the circumstances, his Lordship had left it to the jury to say, whether there was not sufficient evidence before them to presume an actual ouster ; and, supposing, there was an actual ouster, in that case, the lessors of the plaintiff were barred. The jury found, that there was sufficient evidence to presume an actual ouster.

Doe v. Proffer,
Cowp. 217.

After

After the case had been argued, Lord *Mansfield* said,
 “ It is very true, that I told the jury, they were war-
 “ ranted by the length of time, in this case, to pre-
 “ sume an adverse possession and ouster, by one of the
 “ tenants in common, of his companion; and I am
 “ still of the same opinion. Some ambiguity seems to
 “ have arisen from the term *actual ouster*, as if it meant
 “ some act accompanied with real force, and as if a
 “ turning out by the shoulders were necessary: but that
 “ is not so. A man may come in by rightful possession,
 “ and yet hold over adversely without a title: if he
 “ does, such holding over, under circumstances, will
 “ be equivalent to an *actual ouster*. For instance,
 “ length of possession during a particular estate, as a
 “ term for 1000 years, or under a lease for lives, as
 “ long as the lives are in being, gives no title. But,
 “ if tenant *pur autre vie* hold over for 20 years after
 “ the death of *cestuique vie*, such holding over will, in
 “ ejectment, be a complete bar to the remainder-man,
 “ or reversioner; because it was adverse to his title.
 “ So, in the case of tenants in common, the possession
 “ of one tenant in common, *eo nomine*, as tenant in
 “ common, can never bar his companion; because
 “ such possession is not adverse to the right of his com-
 “ panion, but in support of their common title; and,
 “ by paying him his share, he acknowledges him to
 “ be co-tenant. Nor, indeed, is a *refusal to pay of itself*
 “ *sufficient*, without *denying his title*. But if, upon de-
 “ mand by the co-tenant of his moiety, the other *denies*
 “ *to pay*, and *denies his title*, saying he claims the
 “ whole, and will not pay, and continues in possession,
 “ such possession is adverse, and ouster enough.”

The

The court was of opinion, that an undisturbed and quiet possession for such a length of time, was a sufficient ground for the jury to presume an actual ouster; and, therefore, the rule for a new trial was discharged.

§ 16. It has been determined in the following modern case, that where one tenant in common levied a fine of the whole estate, and took the rents and profits afterwards, without account, for nearly five years, this was no evidence, whence a jury should be directed (against the justice of the case) to find an ouster of his companion at the time of the fine levied.

§ 17. *Philip Fincher* being tenant for life, remainder to his first and other sons in tail, remainder to his daughters as tenants in common in tail, (who afterwards levied a fine), died, leaving three daughters; *Mary*, married to *Thomas Hornblower*; *Ann*, married to *Nicholas Pearfull*; and *Margaret*, who died unmarried before Mrs. *Hornblower*.

Peaceable v.
Read,
1 East's Rep.
568.

Mrs. *Hornblower*, under her marriage settlement, having a power to dispose of her share, executed it in favour of the right heirs of her husband, with a power of revocation. She survived her husband, and died on the 9th day of *March* 1796. The lessor of the plaintiff claimed as heir at law of her husband, under her appointment. After her death, *N. Pearfull* and *Ann* his wife, levied a fine of the whole estate, as of *Easter* term 1796.

It

It was understood before the trial, that the defendants meant to claim under a deed or will, or both, of Mrs. *Hornblower*, executed subsequent to the deed of appointment before mentioned; in consequence of which, the plaintiff's counsel produced evidence by anticipation, which went decidedly to prove, that, at that time, and long before, when the supposed instrument bore date, Mrs. *Hornblower* was insane. Whereupon, the defendant's counsel, saying they were not then prepared to meet that case, stood upon their title, derived from the fine operating upon what they contended was an adverse possession, by *Pearfall* and his wife, of the whole estate at the time of the fine levied. As to which, it appeared in evidence, that, since the death of Mrs. *Hornblower*, and till *Pearfall*'s death, the latter alone received the whole rent; and that no rent was ever paid to the lessor of the plaintiff, and no entry was proved to be made by him.

Tit. 35.

For the lessor of the plaintiff, it was insisted at the trial, that no entry was necessary to avoid the fine, he having been tenant in common with *Pearfall* during his life. That he might elect, whether the receipt of rent by *Pearfall* should be an ouster or not; and, if he were not ousted, the fine would only operate on the title and interest of the defendants.

E contra, it was insisted, that, as the lessor of the plaintiff was never in possession, this case was distinguishable from the common case, where several tenants in common being in possession, one of them levies a

fine of the whole ; and that, here, the possession being adverse from the death of Mrs. *Hornblower*, and no entry having been made, the fine was a bar to the plaintiff's recovery.

The jury, under the Judge's direction, found a verdict for the plaintiff ; and leave was given to the defendant to move to enter a nonsuit, if the court should be of opinion that an entry was necessary to avoid the fine.

Lord *Kenyon*.—The whole of the defence is founded in a most unrighteous and fraudulent proceeding ; and, in order to give effect to it, the legal operation of the fine is insisted upon : and, it is asked, if this were not an adverse possession by *Pearfall*, at the time of the fine levied, where the line was to be drawn. His Lordship said, he had no hesitation in saying where the line of adverse possession began, and where it ended. *Primâ facie*, the possession of one tenant in common is that of another ; and every case and *dictum* in the books is to that effect. But you may shew, that one of them has been in possession, and has received the rents and profits to his own use, without account to the other ; and that the other has acquiesced in this for such a length of time, as may induce a jury, under all the circumstances, to presume an actual ouster of his companion ; and there the line of presumption ends. In the case of *Doe v. Proffer*, Lord *Mansfield* rightly said, that it was not necessary to shew actual force, in order to prove an ouster, as by turning a man out by the shoulders. But,
as

as was also observed by Mr. Justice *Aston*, it may be inferred from circumstances; which circumstances are matter of evidence to be left to a jury. There, there was an undisturbed and exclusive possession by one tenant in common for 40 years; which the court properly held to be sufficient evidence of an ouster, to leave to a jury. But no Judge could think himself warranted in directing a jury to make such a presumption in this case, in order to work the grossest injustice, and in aid of fraud. What is the case here? During Mrs. *Hornblower's* life, *Pearfall* held as tenant in common with her: he received all the rent, but he accounted for her proportion. She died in the month of *March* 1796; the defendants, or *Pearfall*, having, as is supposed, procured from her at a time, when the jury have found her to be insane, an instrument conveying the property to them. Then, in *Easter* term following, for the purpose of securing the possession of this ill-gotten property, the fine is levied. But *Pearfall* had then done no act, which manifested that he held the possession of the whole adversely. The levying a fine of the whole was no ouster of his companion: about a month intervened between the death of Mrs. *Hornblower* and the levying the fine. What notice was there to the lessor of the plaintiff, at that time, that *Pearfall* had acted adversely, so that he shall be taken to have acquiesced in his title? All the cases mentioned go upon the ground of acquiescence in an adverse holding, in order to presume an ouster. In *Fairclaim v. Shackleton*, there had been a perception of the rent by one tenant in common for 26 years; but, the title of the other being admitted,

no ouster was presumed. Without an ouster be found by the jury, the possession of one tenant in common must be taken to be the possession of all. I do admit, that, upon the principle of the case of *Lade v. Holford*, the jury may, from circumstances, presume an ouster; and, where the fact is so found, the legal consequences would ensue. But no Judge would advise a jury to make the presumption in this case. Then, unless the holding were adverse, there was no occasion for an entry to avoid the fine. Suppose a tenant for years levied a fine, no entry by the landlord would be necessary, in order to enable him to maintain an ejectment at the end of the term. In *Taylor v. Horde*, Lord *Mansfield* said, that, in order to advance justice, he would enable the real owner, in such a case, to consider himself kept out by wrong or not, at his election. So a tenant in common may rely on the possession of his co-tenant, as his own, unless there be an actual ouster in fact, or the jury find it from circumstances. But nothing of that sort is here found; and, therefore, we may consider the levying of the fine as rightfully and legally done, and intended to operate only on that share of the premises, to which the defendants were lawfully entitled. Mr. Justice *Lawrence* cited the case of *Coppinger v. Keating*, on a writ of error from *Ireland*, *Micb. 22 Geo. 3.* where one of two brothers, professing the catholic religion, entered on the death of his elder brother upon lands, of which they were tenants in common, in consequence of the gavel act, directing that the lands of persons of that persuasion should descend to all the males, according to the custom of gavel-kind;

Bull. N. P.
120.

Tit. 35.

1 Burr. 111.

kind; and held them for several years until his death. And the court determined, that the son of the elder brother was not barred by the statute of limitations; as the uncle was tenant in common with him under that act, no actual ouster being found.

The rule was made absolute for entering a nonsuit.

Subject to
Curtesy.

§ 18. Estates in common are subject to curtesy: and, therefore, where a woman is tenant in fee or in tail, of an estate in common, and marries and has issue, and dies, her husband shall be tenant by the curtesy; and the seisin of one tenant in common will be considered as the seisin of the other for this purpose.

Sterling v.
Penlington,
14 Vin. Ab.
511.

§ 19. *A.* died, leaving a wife, a son, and a daughter: the widow entered upon the estate, and was seised as tenant in dower of one part, as tenant in common with her son of another, and of a third part as guardian in socage to him.

The son went beyond sea, and died there under age, whereby the daughter became entitled. She, during her infancy, married the plaintiff, and, together with him, applied to the mother to be let into possession of the son's part; which the mother refused, imagining the son was still alive, and therefore insisted to hold the land for him. Upon this, they filed a bill in Chancery for an account, which was accordingly directed. After this, the daughter died; and, upon farther application to the court by the husband, one question was, whether the

the seisin of the mother, (after the son's death), being tenant in common with the daughter, was the seisin of the daughter, sufficient to make the husband tenant by the curtesy of her part.

The court held it was sufficient: for the entry and possession of one tenant in common, is the entry and possession of the other; and, accordingly, it was decreed for the plaintiff. Indeed, where one enters, claiming the whole for himself, in exclusion of his companion, this may not serve as the entry of his companion, being made directly against him; but that is not this case. For it appears, that the mother's keeping possession of the whole, against her daughter and her husband, was entirely owing to a mistake, in imagining her son was still living, and not with an intent to exclude the daughter from her right, and, therefore, no inference could be drawn from it.

§ 20. A woman shall also be endowed of an estate in common; but, in such case, dower shall be assigned in common: for the widow cannot have it otherwise than her husband had it.

And to
Dower.
1 Inst. 34 b.
37 b.

§ 21. Estates in common can only be dissolved in two ways; by uniting all the titles in one tenant by purchase or otherwise, which brings the whole to one estate in severalty.

How dis-
solved.

§ 22. By making partition, which, by the common law, might have been made without deed, provided it

Partition at
Law.
1 Inst. 169 a.

Ante, Tit. 18.
Ch. 2. f.

was executed in severalty by livery. And, by the statutes 31 Hen. 8. c. 1., 32 Hen. 8. c. 32., and 9 Wm. 3. c. 31., one tenant in common may compel his companion to make partition by writ,

Halton v.
E. of Thanet,
2 Black. R.
1134. 1159.

8 & 9 Wm. 3.
c. 31.

§ 23. In partition, a rule to shew cause was granted, and afterwards made absolute, on affidavit of service, for the court to proceed to examine the title of the defendant; process having been duly returned, the declaration entered, and no appearance entered by the tenant within ten days. The court, on making the rule absolute, appointed to proceed on the examination in open court on the morrow. On the morrow, *Walker* for the demandant opened his title, of which, abstracts had previously been left with the Judges. It fortunately proved not to be very intricate. The several seifins, descents, devises, and conveyances, were proved by affidavits. The deeds and wills were produced and read: and, no counsel appearing for the tenant, the Earl of *Thanet*, judgment on his default was given for the demandant, to hold in severalty the premises demanded in his count; in some of which, he was seised of two undivided third parts, and, in others, of a moiety only, in common with the said Earl of *Thanet*. And a writ of partition was awarded accordingly.

In a subsequent term, the sheriff returned, that he had executed the same in the presence of persons, who attended for the plaintiff and defendant respectively; and he specified in his return the several parcels, with their metes and boundaries. And, hereupon, *Walker*
for

for the plaintiff moved for final judgment, *quod partitio fit stabilis*. The rule for which was made absolute, the last day of the term, on affidavit of notice to the defendant, and tenants in possession.

§ 24. Partitions of estates, held in common, are now usually made by a commission issuing out of the Court of Chancery; and, in such cases, it is not necessary that every part of the estate should be divided; for it is sufficient, if each tenant in common have an equal share of the whole.

Partition in Equity.

Vide Tit. 18. ch. 2. f.

§ 25. A partition was decreed of an estate, which consisted, among other things, of a great house and park. The defendant insisted to have one-third of the house, and also a third of the park, assigned to him by the commissioners, who were to make the partition. And it was urged for him, that, as he was entitled to a third of the whole, so, consequently, he was to have a third of the house and park: and, in many cases in the law, things entire in their nature, as a house, a mill, or an advowson, might be divided; so a tenant in common shall have half the house, every other toll dish, and every other turn of a church, &c. That thus it would be at law, in case of a writ of partition; and equity follows the law.

Clarendon v. Hornby, 1 P. Wms. 446.

Lord Chancellor *Parker* said, care must be taken, that the defendant shall have one-third part in value of the estate; but there is no colour of reason, that any

part of the estate should be lessened in value, in order that the defendant should have one-third of it. Now, if the defendant should have one-third of the house and park, this would very much lessen the value of both. If there were three houses of different value to be divided amongst three, it would not be right to divide every house: for that would be to spoil every house. But some recompence is to be made, either by a sum of money, or rent for owelty of partition, to those who have the houses of less value. It is true, if there were but one house, or mill, or advowson to be divided, then this entire thing must be divided in manner as the other side contend: *secus*, when there are other lands, which may make up the defendant's share. Therefore, since the plaintiff and his wife have two-thirds, I recommend it that the house and park be allowed to them, and that a liberal allowance out of the rest of the estate be made to the defendant, in lieu of his share of the house and park.

Brook v.
Hertford,
2 P. Wms.
518.

§ 26. Sir George Strode devised divers manors, &c. to trustees and their heirs, in trust for his two granddaughters, Lady Hertford and Lady Brooke.

On a bill for partition, Lord Chancellor King said; Decree a partition; and, for that purpose, let a commission issue to allot one moiety in severalty to Lord Brooke, the son of Lady Brooke, and the other moiety in severalty to Lady Hertford, to hold to them according to their respective estates. But, forasmuch as Lord
Brooke

Brooke (being an infant) cannot join in a conveyance of the moiety to *Lady Hertford*, so that there cannot be mutual conveyances, let the conveyances, to be made by the trustees of the legal estate, be respited until the infant comes to twenty-one.

§ 27. On a bill by tenant in common for partition against tenant for life, and an infant, tenant in tail in remainder of the other moiety, the usual decree for partition to hold and enjoy in severalty, and for mutual conveyances, was made. But day was given to the infant, till after he came of age, to shew cause against the decree.

Tuckfield v. Buller,
Amb. 197.

On a motion made by the plaintiff to respite the execution of the conveyance, till the infant came of age, the question was, whether the plaintiff was obliged to convey till the infant came of age; because he could not have a conveyance from him till that time.

Sir J. Strange M. R., was of opinion, that the conveyance to the plaintiff of his severalty, ought to be made immediately according to the decree; and took a distinction between this case and that of *Brooke v. Hertford*. In that case, the bill for partition was brought by the infant; in this it is by an adult against an infant. But, at the importunity of counsel, leave was given to move it again before the Lord Chancellor, who declared his opinion, that the conveyance

Ante, l. 26.

conveyance ought to be mutual, not only as to the thing, but also, in point of time: and said, that the case of *Brooke v. Hertford*, though different in some circumstances, was a considerable authority, and ordered the conveyance by the plaintiff to be respited.

END OF THE SECOND VOLUME.

